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IN THE

Supreme Court of The United States

JANUARY TERM 1970

No. 1129

ROBERT SLATER,

Respondent,

v.

MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased, and

THE COMMUNITY STATE BANK, HUNTINGTON, INDIANA, Administrator of the Estate of Donald H. Stoffel, deceased,

Petitioners.

GEORGE SLATER,

Respondent,

v.

MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased, and

THE COMMUNITY STATE BANK, HUNTINGTON, INDIANA, Administrator of the Estate of Donald H. Stoffel, deceased,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

The petitioners request that a Writ of Certiorari issue to review the judgment of the Appellate Court of Indiana rendered on June 16, 1969, which the Supreme Court of

Indiana declined to review on November 6, 1969, upon petitioners' application for transfer, in the above cases.

OPINIONS BELOW

The opinion and judgment of the Appellate Court of Indiana is reported in *Robert Slater et al. v. Mark E. Stoffel, Admr.* et al., 248 N.E.2d 378 (Ind. App., 1969). A copy is appended as Appendix I. The order of the Supreme Court of Indiana declining to review the opinion and judgment of the Appellate Court is not yet reported. A copy of the order is appended as Appendix II. The opinions of the United States District Court for the Northern District of Indiana rendered November 20, 1963, referred to in the opinion of the Appellate Court of Indiana, are not reported. Copies are appended as Appendix III. The opinion of the United States Court of Appeals for the Seventh Circuit, referred to in the opinions of the Appellate Court of Indiana and the United States District Court for the Northern District of Indiana, is reported in 313 F.2d 175 (C.A. 7th, 1963), cert. den. 375 U.S. 818, 11 L.Ed. 2d 53 (1963). A copy is appended as Appendix IV. The first decision of the United States District Court for the Northern District of Indiana rendered June 29, 1962, which was reversed by the United States Court of Appeals for the Seventh Circuit, is reported in 206 F. Supp. 534 (N.D. Ind., 1962). A copy is appended as Appendix V. A decision of the Appellate Court of Indiana, rendered on December 12, 1966, is reported in 221 N.E.2d 688 (Ind. App., 1966). A copy is appended as Appendix VI.

A second decision[1] of the United States Court of Appeals for the Seventh Circuit, in a related case, is reported in 411 F.2d 653 (C.A. 7th, 1969). Since reference thereto is not necessary to ascertain the grounds of the judgment which petitioners ask this Court to review, the opinion rendered in that case is not included herein.

JURISDICTION

The judgment of the Appellate Court of Indiana was entered June 16, 1969. The Appellate Court denied petitioners' application for rehearing, filed July 1, 1969, on July 14, 1969. On November 6, 1969, the Supreme Court of Indiana denied petitioners' application to transfer the cases to the Supreme Court, filed July 31, 1969, under which petitioners sought to have said Court review and set aside the judgment of the Appellate Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The questions presented for review are (1) whether the final judgment of a United States District Court, rendered in the exercise of such Court's diversity jurisdiction pursuant to the defendants' (petitioners') motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, adjudging and decreeing that the plaintiffs' (respondents') tort claims for personal injuries are barred by reason of their failure to comply with the Indiana Non-

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[1] In this decision, involving an ancillary proceeding by petitioners to enjoin respondents from proceeding with their appeals in the Appellate Court of Indiana, the Circuit Court of Appeals held that, "The question before us is whether there has been an abuse of discretion," and that the District Court had not abused its discretion in denying injunctive relief to petitioners. 411 F.2d 653, 654.

Claim Statute, §§ 7-801, 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), and further adjudging that the 1961 Amendments to the Indiana Non-Claim Statute, §§ 7-801(f), 7-802, Burns' Ind. Stats. (1969 Cum. Supp.) cannot be applied retroactively so as to save said claims, operates to bar a subsequent action between the same parties on the same claims in a State Court; and (2) whether a State Court may refuse to give due effect to such judgment of the United States District Court, upon the defendants' (petitioners') plea of *res judicata*, on the ground that it is erroneous.

CONSTITUTIONAL PROVISIONS AND STATUTES

A. Constitution of the United States Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

B. United States Statutes

28 U.S.C. § 1738. The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Posssession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (p. 146)

C. Indiana Statutes

Respondents' personal injury actions against petitioners, who are the personal representatives of two decedents, were commenced under the Indiana Survival Statute, § 2-403, Burns' Ind. Stats. (1967 Repl. Ed.), providing in relevant part as follows:

> All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the personal representative of the deceased party; * * * in the event the action be brought subsequent to the death of the party against whom it existed, then the same shall be prosecuted as other claims against said decedent's estate.

The Indiana Survival Statute incorporates, by reference, the provisions of the Indiana Non-Claim Statute, §§ 7-801 (a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), prescribing the manner of filing and prosecuting claims against decedents' estates:

> § 7-801(a). All claims against a decedent's estate, other than expense of administration and claims of the United States, and of the state or any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court in which such estate is being administered within

six (6) months after the date of the first published notice to creditors. (p. 255)

> § 7-802. No action shall be brought by complaint or summons against the personal representative of an estate for the recovery of any claim against the decedent, or his estate, but the holder thereof, whether such claim be due or not, shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending; * * * the statement shall set forth all credits and deductions to which the estate is entitled and shall be accompanied by the affidavit of the claimant, his agent or attorney, that the claim, after deducting all credits, set-offs and deductions to which the estate is entitled, is justly and wholly unpaid, or if not yet due, when it will or may become due, and no claim shall be received unless accompanied by such affidavit. (p. 257)

In 1961, the General Assembly of the State of Indiana amended §§ 7-801(a), 7-802, supra, so as to permit an action in tort against the estate of a deceased tortfeasor within the period the statute of limitations provided for such tort. Such 1961 Amendments to the Indiana Non-Claim Statute, §§ 7-801(f), 7-802, Burns' Ind. Stats. (1969 Cum. Supp.), insofar as they are relevant to these cases, provide as follows:

> § 7-801 (f) Nothing in this section shall affect or prevent the enforcement of a claim arising out of tort against the estate of a deceased tort-feasor within the period of the statute of limitations provided for such tort action and for the purpose of enforcing such a tort claim the estate of the tort-feasor may be opened or reopened and suit filed against the personal representative of the estate within the period of the statute of limitations of such tort; * * * (p. 30)

> § 7-802. No action shall be brought by complaint and summons against the personal representative of an estate for the recovery of any claim against the

decedent or his estate, except in the enforcement of claims arising out of tort as provided in section 1401 (§ 7-801) of this act as amended, * * * (pp. 32-33)

STATEMENT OF THE CASE, INCLUDING STAGE OF PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE RAISED, MANNER AND METHOD BY WHICH FEDERAL QUESTIONS WERE RAISED, AND WAY IN WHICH FEDERAL QUESTIONS WERE PASSED ON BY THE STATE COURT

These actions for damages for personal injuries were originally filed by respondents against petitioners, as the personal representatives of two decedents, Bernard J. Stoffel and Donald H. Stoffel, in the United States District Court for the Northern District of Indiana on December 2, 1959. Each action arises out of a motor vehicle accident which occurred in Huntington County, Indiana, on June 6, 1959, in which petitioners' said decedents were killed. Each is based on certain acts of negligence, allegedly committed by the decedents, in the operation of a motor vehicle.

After protracted litigation in the Federal Courts, including an appeal to the United States Court of Appeals for the Seventh Circuit, *George Slater* et al. *v. Mark E. Stoffel, Admr.* et al., 313 F.2d 175 (C.A.7th, 1963), cert. den. 375 U.S. 818, 11 L.Ed. 2d 53 (1963), as a result of which the Court of Appeals upheld petitioners' affirmative defenses that respondents' said claims are barred under the Indiana Non-Claim Statute, supra, by reason of their failure to file same with the Clerk of the State Court in which the administration of the estates of petitioners' decedents was pending, within six months after the first publication of notice to creditors of the estates (as re-

quired by §§ 7-801(a), 7-802, Burns' Ind. Stats., 1953 Repl. Ed., supra), the United States District Court for the Northern District of Indiana granted petitioners' motions for summary judgment under Rule 56, Federal Rules of Civil Procedure, and held that respondents' claims are barred:

Robert Slater Case

> "In regard to prosecuting claims against a decedent's estate, Ind. Ann. Stat. § 7-801(a) (Burns' 1953 Repl. Ed.) provides, in substance, that all claims against a decedent's estate, other than those of administration and claims of the United States, shall be *forever barred* unless filed with the court in which such estate is being administered within six months after the date of the first published notice to creditors. * * * Plaintiff [Robert Slater] filed his complaint in the United States District Court for the Northern District of Indiana, Fort Wayne Division, on December 2, 1959. *However, plaintiff has never filed a statement of his claim with the clerk of the Huntington Circuit Court, the Court in which the estate is pending. Having failed to file any such claim within the six-month statutory period of either estate, plaintiff's claim is barred, and the Circuit Court of Appeals for the Seventh Circuit has so held.*" (Tr. in No. 668A 101, pp. 127-30) (Emphasis added)

George Slater Case

> "In regard to prosecuting claims against a decedent's estate, Ind. Ann. Stat. § 7-801(a) (Burns' 1953 Repl. Ed.) provides in substance, that all claims against a decedent's estate, other than those of administration and claims of the United States, shall be *forever barred* unless filed with the court in which such estate is being administered within six months after the date of the first published notice to creditors. * * * *Plaintiff* [George Slater] *having failed to file a claim such as is required by the statutes of the State of Indiana and the opinion of the United States*

> *Court of Appeals for the Seventh Circuit within the six-month statutory period of either estate, his claim is barred. Slater v. Stoffel*, supra. In light of this decision and the subsequent denial of a petition for a writ of certiorari thereof by the Supreme Court of the United States, the defendants are deemed entitled to summary judgment in this matter." (Tr. in No. 668 A 102, pp. 134-36)

In so holding, the District Court considered respondent Robert Slater's contention that his claim could be maintained under the 1961 Amendments to the Indiana Non-Claim Statute. (§§ 7-801(f), 7-802, Burns' Ind. Stats., 1969 Cum. Supp., supra). In rejecting such contention, the District Court held that said amendments . . .

> "* * * do not apply to this cause of action, and the same has been so held by this court in the previous order in this case, which holding was not disturbed by the reversing opinion of the Court of Appeals for the Seventh Circuit. Plaintiff so conceded that the amendments did not apply in his argument before this Court. Plaintiff's contention in this regard is therefore without merit." (Tr. in No. 668 A 101, pp. 128-29)

In the "previous order" referred to, reported in 206 F. Supp. 534, 536 (N.D. Ind., 1962), the District Court had ruled in both actions that "the July 6, 1961 amendment does not affect the case at bar."

Consistent with such holdings, the District Court rendered judgment in favor of petitioners, and against respondents, on the causes of action sued upon, and adjudged that respondents take nothing under their respective complaints for damages in their Federal Court actions. (Tr. in No. 668 A 101, pp. 132-33; Tr. in No. 668 A 102, pp. 138-39)

In an attempt to avoid the aforesaid holdings and judgments of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Northern District of Indiana, respondents filed separate civil actions in the Huntington Circuit Court of Huntington County, Indiana, on October 24, 1964, seeking to recover damages from petitioners on the same identical claims for personal injuries which had formed the basis of their actions previously adjudicated to finality in the Federal Courts.

Again, respondents contended (in their State Court actions) that they were entitled to maintain their claims, against petitioners, under the 1961 Amendments to the Indiana Non-Claim Statute, supra, and argued that said amendments should be applied retroactively so as to save said claims. This is the same argument respondents made in the Federal Courts.

Petitioners appeared in the State Court actions, and, after same had been venued to the Kosciusko Circuit Court of Kosciusko County, Indiana, in due course filed therein motions for summary judgment under the Indiana Summary Judgement Statute, § 2524, Burns' Ind. Stats. (1968 Cum. Supp.), setting up affirmatively the rulings and judgments of the Federal Courts, and the *res judicata* effect thereof, in bar of respondents' claims. (Tr. in No. 668 A 101, pp. 71-77; Tr. in No. 668 A 102, pp. 70-76) Such motions of petitioners were supported by certified copies of the Federal Court judgments, and the proceedings leading up to the rendition thereof, all of which were duly authenticated in the manner and form prescribed by 28 U.S.C. § 1738, supra. (Tr. in No. 668 A 101, pp. 77-133; Tr. in No. 668 A 102, pp. 76-139)

On May 8, 1968, the Kosciusko Circuit Court granted petitioners' motions for summary judgment, adjudging that neither respondent should recover in said State Court actions, and entered judgments against respondents and in favor of petitioners. (Tr. in No. 668 A 101, p. 236; Tr. in No. 668 A 102, p. 242)

Upon respondents' appeal to the Appellate Court of Indiana, in which respondents contended in their assignments of error that the trial court had "erred in granting appellees' (petitioners') motions for summary judgment" (Tr. in No. 668 A 101, p. 3; Tr. in No. 668 A 102, p. 3), the Appellate Court reversed the judgments of the Kosciusko Circuit Court which had been rendered in favor of petitioners. In so doing, it pronounced the aforesaid rulings and judgments of the Federal Courts "erroneous" and failed to give them any effect whatever as a bar to respondents' State Court actions:

> "The Supreme Court of the United States denied certiorari, 375 U.S. 818, 84 S.Ct. 54, 11 L.Ed. 2d 53 (1963), and thereafter the cause was remanded to the [United States] District Court, which entered judgment for defendants-appellees (petitioners) on the theory that plaintiffs'-appellants' (respondents') claims were barred for failure to file a claim with the court against the decedents' estates within the six-month statutory period provided in §§ 7-801 and 7-802, supra.
>
> * * *
>
> In order that a former judgment may constitute a defense, such judgment must have been on the merits. *Johnson v. Knudson-Mercer Co.* (1906), 167 Ind. 429, 79 N.E. 367; *Guthrie v. Blakely* (1955), 127 Ind. App. 119, 130 N.E.2d 62, 131 N.E.2d 357; *Banta v. Banta* (1948), 118 Ind. App. 117, 76 N.E.2d 698, 77 N.E.2d 597; *Evansville American Legion Home Association*

v. White (1967), Ind. App., 230 N.E.2d 623; 17 I.L.E. *Judgment*, § 443, pp. 453-454. *The Federal Court judgment was not, in our opinion rendered on the merits, but was based upon an erroneous view as to a procedural requirement.* 58 Am. Jur., *Judgments*, § 627, p. 52. It was therefore error to grant summary judgments by reason of such Federal Court Judgment." (App. I, pp. A8 - A9)

The Appellate Court therewith entered its judgment reversing the judgments of the Kosciusko Circuit Court rendered in favor of petitioners, and remanding the cases to said Court with instructions to overrule petitioners' motions for summary judgment. (App. I, p. A9)

The Federal Court judgments and proceedings were presented to the Appellate Court of Indiana in the transcripts (Tr. in No. 668 A 101, pp. 132-33; Tr. in No. 668 A 102, pp. 138-39) on appeal and in petitioners' briefs. The *res judicata* effect thereof, and the Federal questions as to whether such judgments and proceedings constituted a bar to respondents' State Court actions under 28 U.S.C. § 1738, supra, and the applicable decisions of this Court, were argued extensively by petitioners in their briefs on appeal, in their application for a rehearing, which was denied by the Appellate Court on July 14, 1969, in their application to transfer the cases to the Supreme Court of Indiana which was denied by that Court on November 6, 1969, and in the briefs of petitioners filed in support of such applications for rehearing and transfer.

Since the aforesaid portions of the record in these cases are voluminous, petitioners' motions for summary judgment which were granted by the Kosciusko Circuit Court of Kosciusko County, Indiana, and the portions of their brief on appeal, application to the Appellate Court of Indiana for a rehearing, and application for transfer to the Supreme Court of Indiana, dealing with the federal questions raised in the State Court proceedings which petitioners ask this Court to review, are separately presented in a Supplemental Appendix to this Petition.

REASONS FOR GRANTING THE WRIT

In holding that the judgments rendered by the United States District Court for the Northern District of Indiana, pursuant to Rule 56, Federal Rules of Civil Procedure, were not on the "merits" and were "based upon an erroneous view as to a procedural requirement", the Appellate Court of Indiana not only failed to give due effect to such judgments of a court of the United States, thereby denying to petitioners a right, privilege or immunity specially set up and claimed under the Constitution, statutes of, or authority exercised under, the United States, 28 U.S.C. § 1257(3), supra, but also decided a federal question of substance not theretofore determined by this Court, namely, whether a summary judgment under Rule 56 that a claim is barred under a State's non-claim statute is on the "merits" and a bar to a subsequent action between the same parties on the same claim in a State Court.

Furthermore, the Appellate Court's decision that such a judgment is not on the "merits" and does not bar a subsequent State Court action, is not in accord with applicable decisions of this Court.

Under the predecessor statute to 28 U.S.C. § 1257, supra, which this Court has held "is broader than the authority granted by Article 4, section 1, of the Constitution to prescribe the manner and proof and effect of the judicial proceedings of states," *Stoll v. Gottlieb,* 305 U.S. 165, 83 L.Ed. 104, 107-108 (1938), reh. den. 305 U.S. 675, 83 L.Ed. 437 (1938), it has been held that a State Court must give due effect to the judgment of a Federal Court of concurrent jurisdiction when such judgment is properly presented upon the applicant's plea of *res judicata. Deposit Bank of Frankfort v. Board of Councilmen* et al., 191 U.S. 499, 48 L.Ed. 276 (1903).

Such judgment of the Federal Court "is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity, and its effect are complete in all respects between all parties in every suit where it is legitimately produced as a foundation of an action, or of a defense, either by plea or proof, as it would be under any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate. . . ." *Crescent City Livestock Landing and Slaughter-House Company et al. v. Butchers' Union Slaughterhouse and Live-Stock Company,* 120 U.S. 141, 30 L.Ed. 614, 620-21 (1887).

To the same effect see *Hancock National Bank v. Farnum,* 176 U.S. 604, 44 L.Ed. 619 (1899), *Metcalf v. Watertown,* 153 U.S. 671, 38 L.Ed. 861 (1893), *Embry v. Palmer,* 107 U.S. 3, 27 L.Ed. 346 (1882), and *Dupasseur v. Rochereau,* 88 U.S. 130, 22 L.Ed. 588 (1875).

This Court possesses final authority to review the decision of the highest court of a State denying to a litigant the benefit of a judgment rendered in his favor by a Federal Court. *Donohoe v. Vosper,* 243 U.S. 59, 61 L.Ed. 592 (1917); *Supreme Lodge, K. of P. v. Meyer,* 265 U.S. 30, 68 L.Ed. 885 (1923); and *Dupasseur v. Rochereau,* 88 U.S. 130, 22 L.Ed. 588 (1875).

A State Court may not "inquire into and revise the reasons which led the [Federal] Court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were, in the judgment of the court before which the estoppel is pleaded, insufficient, a new judgment could be rendered because of the divergent views, and the whole matter would be at large." *Deposit Bank of Frankfort v. Board of Councilmen* et al., supra, at pp. 280-81, 48 L.Ed.

Contrary to these well-established principles, the Appellate Court of Indiana did reopen, examine, and in effect "revise," the judgments rendered in petitioners' favor, by the Federal Courts, under which respondents' claims were adjudged barred by reason of their failure to comply with the Indiana Non-Claim Statute. Finding such judgments to be in its opinion "erroneous", the Appellate Court refused to give them any effect whatsoever as a bar to respondents' State Court actions. This was clearly a denial to petitioners of the "complete protection" to which they were entitled under such judgments which had been procured under the authority of courts of the United States.

The fact that the Appellate Court of Indiana held that the 1961 Amendments to the Indiana Non-Claim Statute

could be applied retroactively to respondents' claims, whereas the Federal Courts had previously held that they could not be thus applied, did not justify the Appellate Court in refusing to give due effect to the Federal Court judgments. Such adjudications of the Federal Courts had become final long prior to the first decision of the Appellate Court in *Staple v. Richardson* (Ind. App., 1966), 212 N.E.2d 904, decided January 11, 1966, recognizing such retroactivity. A subsequent construction given a state statute, by a State Court, does not remove the bar arising by reason of a prior Federal Court judgment based on that court's construction of the same statute. *Deposit Bank of Frankfort v. Board of Councilmen* et al., supra.

Nor may full faith and credit, or due effect, be denied a judgment on the ground that it is "erroneous" or that it was based upon a "mistake of law." *Reed v. Allen,* 286 U.S. 191, 76 L.Ed. 1054, 1058 (1931), *Marin v. Augedeahl,* 247 U.S. 142, 62 L.Ed. 1038, 1042 (1917).

The opinion of the Appellate Court of Indiana states that the Federal Court judgments rendered in petitioners' favor cannot be invoked as a bar because they were not "rendered on the merits, but were based upon an erroneous view as to a procedural requirement." 248 N.E. 2d 378, 384. The Court thus appears to have assumed that since respondents' Federal Court actions never progressed to the point where a decision was made on the ultimate substantive issues of their claims, i.e., the issues of negligence and damages, there was no disposition on the "merits." However, "It is a misconception of the *res judicata* doctrine to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ulti-

mate substantive issues may bar a second attempt to reach them in another court of the State." *Angel v. Bullington*, 330 U.S. 183, 91 L.Ed. 832, 837 (1946).

It is well-established, moreover, that the Indiana Non-Claim Statute is "not a statute of limitation, but a denial of a right of action. It imposes a *condition precedent* to the enforcement of a right of action." *Donella, Admrx. et al v. Crady* (1962), 135 Ind. App. 60, 185 N.E.2d 623, trans. den. (1963), 244 Ind. 205, 191 N.E.2d 499. "Unless such a [tort] claim is filed, within the time so allowed by the statute, it is forever barred. The time element is a *built-in condition* of the said statute and is of the essence of the right of action." *Donella, Admrx. v. Crady*, supra, at p. 625, 185 N.E.2d.

An adjudication that a claim is barred under such a statute is substantive and not procedural. It goes to the merits of the controversy and is binding on the claimant, and *res judicata*, in any subsequent action brought on the same claim in either a State or Federal Court. *Atlantic Coast Line Railroad Co. v. Burnette*, 239 U.S. 199, 60 L.Ed. 226 (1915); *Davis v. Mills*, 194 U.S. 451, 48 L.Ed. 1067 (1903); and see Vol. 1B, Moore's *Federal Practice* (1965 Ed.), Par. 0.409(6), at pp. 1033-34.

In view of the nature of the Indiana Non-Claim Statute as a "statute of creation" and not of "limitation", embodying a certain time element which is "of the essence of the right of action itself", an adjudication that a claim is "barred" thereunder, such as that invoked by petitioners' in these cases, is of necessity "substantive" and not "procedural." This is the reason why Federal Courts have held not only in these cases, *Slater v. Stoffel*, 313 F.2d 175 (C.A.7th, 1963), cert. den. 375 U.S. 818, 11 L.Ed.2d 53 (1963), but also in at least one other case, *Woods v.*

Klobuchar, 257 F.2d 313 (C.A.7th, 1958), that the question of whether a claim is barred by this statute presents a "substantive" matter.

In many cases, it has been held that "a summary judgment terminating a suit upon motion therefor under Rule 56 is a final adjudication on the merits." Vol. 1B, Moore's *Federal Practice* (1965 Ed.), Par. 0.409(1); Vol. 3, Barron & Holtzoff, *Federal Practice and Procedure* (1958 Ed.), § 1246. A summary judgment against a plaintiff is a "general judgment in favor of a defendant and is an effective bar under the doctrine of *res judicata* to a subsequent action between the same parties on the same cause of action." *Sapp v. Gerlein* et al., 236 F. Supp. 823, 825 (W.D. Pa., 1964); *Wolcott v. Hutchins,* 280 F. Supp. 559, 562-63 (S.D. N.Y., 1968); *Hull v. Brandywine Fibre Products Co.,* 121 F. Supp. 108 (D.C. Del., 1954); *Curacao Trading Co., Inc. v. Federal Ins. Co.* et al., 3 F.R.D. 203 (S.D.N.Y., 1942); and see *Stokke v. Southern Pac. Co.,* 169 F.2d 42 (10th Cir., 1948).

The judgments rendered by the Federal Courts, in favor of petitioners, were therefore on the "merits" under applicable decisions of this Court and settled principles of Federal jurisprudence. They were not "procedural" in any sense.

In order that petitioners may have the protection to which they are entitled under the judgments rendered in their favor, and against respondents, by the Federal Courts, and to insure that such judgments and the judicial

proceedings of the courts of the United States, leading to the rendition thereof, will be given due effect under the law, a Writ of Certiorari should issue to review the decision and judgment of the Appellate Court of Indiana in these cases.

Respectfully submitted,

THOMAS W. YODER,
Attorney for Petitioners, Mark E. Stoffel, Administrator of the Estate of Bernard J. Stoffel, deceased, and The Community State Bank, Administrator of the Estate of Donald H. Stoffel, deceased.

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Of Counsel.

APPENDIX I

IN THE
APPELLATE COURT OF INDIANA
DIVISION NO. TWO

ROBERT SLATER,	)
GEORGE SLATER,	)
Appellants,	)
v	)
MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased,	) NO. 668 A 101) NO. 668 A 102
	) (Consolidated)
THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased,	)
Appellees.	)

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT

HONORABLE GENE B. LEE, JUDGE

PFAFF, C.J.

On June 6, 1959, an automobile driven by appellant, George Slater, a resident of Georgia, and containing a passenger, his son, appellant, Robert Slater, collided with a vehicle being operated by either Bernard J. Stoffel or Donald H. Stoffel, both of whom were killed in the collision.

On December 2, 1959, appellants filed actions for damages in the United States District Court for the Northern District of Indiana naming the personal representatives of the deceased individuals as defendants. The District Court suit resulted in a verdict for appellants (*Slater v. Stoffel* (1962), 206 F. Supp. 534), but that decision was reversed in favor of appellees in an appeal to the Seventh circuit Court of Appeals. *Slater v. Stoffel* (CCA 7th, 1963), 313 F. 2d 175. The issue in that appeal was whether the plaintiffs could maintain their actions in the United States District Court without first complying with Acts 1953, ch. 112, §§ 1401 and 1402, p. 295, §§ 7-801 and 7-802, Burns' 1953 Repl.

The original issue disposed of before the United States District Court for the Northern District of Indiana was the claim of the defendants that the District Court did not have jurisdiction of the subject matter because jurisdiction was vested in the Huntington Circuit Court and, further, that the statute of limitations barred the actions because the plaintiffs failed to file their claims as required by §§ 7-801 and 7-802, *supra,* which the defendants alleged are not merely acts of limitation but constitute the denial of a right of action and impose conditions precedent.

The District Court granted the plaintiffs' motions to strike these affirmative defenses and granted the defendants immediate leave to appeal. The appeal before the Seventh Circuit Court of Appeals resulted in a reversal of the order granting the motion to strike for the reason that, in the opinion of the Court, compliance with §§ 7-801 and 7-802, *supra,* constituted conditions precedent to the enforcement of plaintiffs' actions and, therefore, the motion to strike was improperly granted in light of the fact

that neither plaintiff filed a claim, together with the affidavit required by statute, against the estate of either decedent pursuant to §§ 7-801 and 7-802, *supra,* even though each plaintiff did file a complaint in the United States District Court within the six-month statutory period prescribed by § 7-801(a).

The Supreme Court of the United States denied certiorari, 375 U.S. 818, 84 S. Ct. 54, 11 L. Ed. 2d 53 (1963), and thereafter the cause was remanded to the District Court, which entered judgment for the defendants-appellees on the theory that plaintiffs-appellants' claims were barred for failure to file a claim with the court against the decedents' estates within the six-month statutory period provided in §§ 7-801 and 7-802, *supra.*

Each appellant then instituted an action in the Huntington Circuit Court for $100,000.00 in damages.

Subsequent to joinder of the issues and a demurrer to the complaints, said demurrers were sustained and the appellants refused to plead over. Appellants' motion for new trial was overruled and an appeal was then taken to this court. This court reversed the judgment of the Huntington Circuit Court in *Slater v. Stoffel* (1966), ——— Ind. App. ——, 221 N.E. 2d 688, and held that the appellants could bring their tort actions against appellees under § 7-801(f) instead of filing a claim against the estate within six months after the first published notice to creditors, and further held that the provisions of § 7-801(f) could, because of their procedural nature, be applied retroactively, thereby allowing claimants the relief sought. This court stated that the Federal court erred in not providing for retroactive application of the statute and that § 7-801 (f) applied retroactively was intended to remove the conditions precedent in tort actions, which required the filing

of claims within six months after notice to creditors. This court stated at page 693 of 221 N.E. 2d:

> "In the absence of express language to the contrary an amendatory act ordinarily is construed as prospective and not as retroactive. *Cummins v. Pence et al.* (1910), 174 Ind. 115, 91 N.E. 529.
>
> "In the event the new legislation does not impair an existing right or deny a remedy for its enforcement, but merely modifies the proceedings, it applies to all cases pending and subsequent to its enactment. *Kingan & Company, Limited v. Ossam* (1920), 75 Ind. App. 548, 121 N.E. 289.
>
> "The federal court's error was compounded by the trial court when it sustained the demurrers to appellants' complaint and overruled their motion for a new trial.
>
> "We summarily reiterate that appellants' cause of action survived the death of the appellees and was tolled by the commencement of this action in the federal district court and again in the trial court. The 1961 amendment to Section 7-801 by adding subsection (f) thereto is a procedural requirement to be applied in any action pending in the courts at the time of its passage. It should have been so applied in the case at bar. Failure to do so was prejudicial and reversible error on the part of the federal courts and trial court. It is our opinion that the trial court erred in overruling appellants' motion for a new trial; and the judgment of the trial court is hereby reversed with instructions to sustain appellants' motion for a new trial."

Pursuant to remand and trial on the merits, the venue of these causes was changed to Whitley County and then to Kosciusko County. In the Kosciusko Circuit Court the defendants-appellees' motion for summary judgment was granted on the grounds that the judgment of the United

States Court of Appeals for the Seventh Circuit barred further proceedings in Indiana actions under the doctrines of *res judicata* and collateral estoppel.

The appellants contend that the trial court's action was based upon the previously stated doctrines. However, appellees contend that the judgment was not founded on *res judicata* or collateral estoppel, and assert that their demurrer was based upon appellants' failure to allege compliance with §§ 7-801 and 7-802, *supra*, therefore failing to state facts sufficient to constitute a cause of action, and that said demurrer was sustained on these grounds.

Appellees assert that no question of *res judicata* was presented in the prior appeal to this court and that *res judicata* became applicable to their situation only upon the filing of appellees' motion to amend and correct the prior defective judgment in the United States District Court for the Northern Division of Indiana. The judgment entered was allegedly not strictly in accordance with the order of the court and on July 13, 1967, it was corrected nunc pro tunc, to be effective as of November 20, 1963. No appeal was taken from these judgments in actions identical to those pending in the Huntington Circuit Court.

Appellees contend that these new judgments are the basis of the motions for summary judgment because of the doctrine of *res judicata*.

Appellants argue that in sustaining appellees' motions for summary judgment the Kosciusko Circuit Court contravened a ruling precedent of this court established in the prior appeal to this court under the same caption as the one herein. This argument is based on the alleged fact that this court had previously determined the effect of the Federal Court judgment and that the exact same issue was

presented by appellees' motions. In effect, it is argued that our prior opinion became the law of the case and that the granting of summary judgment reverses our prior decision and is therefore reversible error and contrary to law.

Appellees filed their motion to dismiss or affirm for reasons which do not go to the jurisdiction of this court. The motion to dismiss was overruled and the motion to affirm, based upon alleged deficiencies in appellants' brief, held in abeyance pending the determination of the causes. We believe that most, if not all, of the documents not summarized in appellants' brief would have been surplusage if included. Appellants' brief indicates a good-faith effort to comply with the rules of the Supreme Court and there has been at least substantial compliance so that this court is able to understand the issues and points raised. The motion to affirm because of alleged defects in appellants' brief is overruled.

Both appellants and appellees have at one time or another taken the position that the effect of the Federal court judgment as a defense to the State court proceedings was before this court on the first appeal, although appellees now claim that it was not.

Our decision in the first appeal to this court has become the law of this case, and it is immaterial at this time as to whether such decision was right or wrong. 3 Wiltrout Ind. Civ. Proc. § 2791, p. 498; *Egbert v. Egbert* (1950), 120 Ind. App. 670, 95 N.E. 2d 637. It therefore becomes necessary to ascertain just what was presented for decision and decided. *Egbert v. Egbert* (1956), 235 Ind. 405, 132 N.E.2d 910.

At the time of the prior appeals to this court appellees had filed their demurrers to the complaints based upon

the sole statutory ground that they do not state facts sufficient to constitute a cause of action. No answers had been filed to the complaints, either general or special. The complaints did not set forth facts concerning the prior Federal court actions.

A demurrer attacks only defects which appear on the face of the complaint. Acts 1911, ch. 157, § 2, p. 415, § 2-1007, Burns' 1967 Repl.; *Roberts v. Indiana Gas and Water Co.* (1966), —— Ind. App. ——, 218 N.E.2d 556; *Cole v. Gray* (1894), 139 Ind. 396, 38 N.E. 856; *Foulkes Contracting Co. v. Crowder* (1931), 93 Ind. App. 100, 171 N.E. 304; *First National Bank of Huntington v. Williams et al.* (1891), 126 Ind. 423, 26 N.E. 75; 23 I.L.E., *Pleading*, § 93, p. 323. A "speaking demurrer" is not a proper device. *Douglass v. Blankenship* (1875), 50 Ind. 160. "A defendant may not use a demurrer to serve the purpose of an answer by including in the demurrer allegations of fact which, although pertinent and material, have not been alleged by plaintiff." 1 Gavit Indiana Pleading and Practice, § 124, p. 611.

Former adjudication or *res judicata* is a matter of defense and prior to the enactment of the summary judgment statute, Acts 1965, ch. 9-, § 1, p. 126, § 2-2524, Burns' 1968 Repl., it was waived where not pleaded and proved. *Brown v. Stapleton* (1940), 216 Ind. 387, 24 N.E. 2d 909; *Young v. Young* (1937), 118 Ind. App. 25, 76 N.E. 2d 267; 17 I.L.E., *Judgment*, § 442, p. 452. Appellants insist that even though the defense of *res judicata* had not been properly raised in the court below at the time of the first appeal to this court, appellees actually raised it there as well as in the briefs on appeal, and appellees are now estopped from contending that the defense was not before this court. A reading of the opinion of this court discloses that the defense of *res judicata* was not discussed and no opinion was

expressed thereon. We did not decide anything on this point which became the law of the case.

In the summary judgment procedure in the State court appellees set forth and rely upon the prior Federal court judgment, still without filing an affirmative answer. The propriety of raising such defense by summary judgment proceedings where it has not been affirmatively pleaded is not questioned in the briefs in these appeals. Our summary judgment statute is similar to Fed. R. Civ. P. 56, and our requirement of pleading *res judicata* affirmatively is similar to the requirements of Fed. R. Civ. P. 8(c). While the Federal decisions are not completely unanimous, it appears to be held generally that the defense of *res judicata* can be raised in Federal court by a motion for summary judgment. 1A Barron and Holtzoff, Federal Practice and Procedure, § 279, pp. 155-173. Where the facts necessary to constitute an affirmative defense are without conflict, and it is clear that a defendant desires to present the defense and not to waive it, nothing further could be developed by requiring that it be pleaded and that there be a trial of the issue. We hold that such defense was proper to be considered here, though not affirmatively pleaded by answer.

In order that a former judgment may constitute a defense, such judgment must have been on the merits. *Johnson v. Knudson-Mercer Co.* (1906), 167 Ind. 429, 79 N.E. 367; *Guthrie v. Blakely* (1955), 127 Ind. App. 119, 130 N.E. 2d 62, 131 N.E. 2d 357; *Banta v. Banta* (1948), 118 Ind. App. 117, 76 N.E. 2d 698, 77 N.E. 2d 597, *Evansville American Legion Home Association v. White* (1967), —— Ind. App. ——, 230 N.E. 2d 623; 17 I.L.E., *Judgment*, § 443, pp. 453-454. The Federal court judgment was not, in our opinion, rendered on the merits, but was based upon an erroneous view as to a procedural requirement. 58 Am.

Jur., *Judgments*, § 348, p. 390; 50 C.J.S., *Judgments*, § 627, p. 52. It was therefore error to grant summary judgments by reason of such Federal court judgment.

JUDGMENT

The summary judgments entered herein are reversed and the causes remanded with instructions to overrule appellees' motions for summary judgment, to cause the issues to be closed, and for further proceedings not inconsistent with this opinion.

Pursuant to Acts 1881 (Spec. Sess.), ch. 38, § 652, p. 240, § 2-3237, Burns' 1968 Repl., the appellants shall recover costs.

CONCURRING OPINION

WHITE, J.

While it is true that an adjudication not on the merits does not preclude relitigation of issues not decided (if the objection which proved fatal in the first action can be avoided in a subsequent action[1]) it is nevertheless, con-

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[1] *Griffith v. Bank of New York* (C.A.2d N.Y.), 147 F.2d 899, 160 A.L.R. 1340, cert. den. 325 U.S. 874, 89 L.ed. 1992, 65 S. Ct. 1414, (1945); *Miller v. Milford*, 224 Iowa 753, 276 N.W. 826, 114 A.L.R. 1423, (1937); Re. *Craven*, 178 La. 372, 151 So. 625, 90, A.L.R. 973, (1933); *Healy v. Atchison, T. & S. F.R.Co.* —— Mo. ——, 287 S.W.2d 813; *Chirelstein v. Chirelstein*, 12 N.J. Super 468, 79 A.2d 884, (1951); *Brick v. Cohn-Hall-Marx Co.*, 283 N.Y. 99, 27 N.E. 518; *Converse v. Sickles*, 146 N.Y. 200, 40 N.E. 777, 48 Am. St. Rep. 790; *Hutchings v. Zumbrunn*, 86 Okl. 226, 208 P. 224, (1922); *Gist v. Davis*, 11 S. C. Eq. (2 Hill) 335, 29 Am. Dec. 89; *Peterson v. Morris*, 119 Wash. 335, 205 P. 408. Anno: 11 L. ed. 1059. "A surrogate court's dismissal of a suit to compel an accounting by a trustee whose accounts have been previously approved by a judgment entered upon stipulation of the parties in the Supreme Court is not a bar to a suit in a federal court for damages for breach of trust and for duress in procuring the stipulation upon which the Supreme Court judgment was entered, where the dismissal was for reasons not going to the merits." *Griffith v. Bank of New York* (C.A.2d N.Y.) 147 F.2d 899, 160 A.L.R. 1340, cert. den. 325 U.S. 874, 89 L. ed. 1992, 65 S. Ct. 1414.

clusive as to the points actually decided.[2] The federal court decision was that appellants' cause of action was barred by the six-months limitation of Ind. Acts. 1953, ch. 112, § 1401, Burns IND. STAT. ANN. § 7-801, subsection (a) and that Ind. Acts 1961, ch. 287, § 1, which added subsection (f) creating an exception for tort claims, did not apply to appellants' cause of action which arose in 1959. Thus this federal court decision established a rule of law binding on the parties to this action. Therefore, had

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[2] *Healy v. Atchison, T. & S.F.R.Co.* —— Mo. ——, 287 S.W.2d 813; *Dunseth v. Butte Electric R. Co.*, 41 Mont. 14, 108 P. 567, 21 Ann. Cas. 1258, (1910); *Chirelstein v. Chirelstein*, 12 N.J. Super 468, 79 A.2d 884; *Brick v. Cohn-Hall-Marx Co.*, 283 N.Y. 99, 27 N.E.2d 518. In *Healy v. Atchison, T. & S.F. R. Co., supra* [287 S.W.2d 813, 815 (1956)] the Supreme Court of Missouri said: "Obviously the judgment of dismissal in the first case was not a judgment on the merits of plaintiffs' cause of action; and, therefore, plaintiffs claim the right to commence a new action within one year under authority of Section 516.230. (Statutory references are to RSMo and V.A.M.S.) The trouble with plaintiffs' contention is that as the grounds for dismissal the Court decided plaintiffs had no right to maintain the action in the Circuit Court of the City of St. Louis and they did not appeal. In this situation, the rule is thus stated: 'Where a valid and final personal judgment not on the merits is rendered in favor of the defendant, the plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what is actually decided.' Sec. 19, A.L.I. Restatement of Judgments; see also Sec. 53, especially Comment c. In explanation of this rule, it is stated: 'A judgment for the defendant may be based upon the ground that the plaintiff is not entitled to maintain an action in the State in which the judgment is rendered and not on a ground which would be applicable to an action in other States. In such a case thy judgment is on the merits to the extent that it will bar the plaintiff from maintaining a further action in that State, but it is not on the merits so far as actions in other States are concerned. * * * Although, where the judgment for the defendant is not on the merits, the plaintiff is not precluded from maintaining a new action on the same cause of action, he is precluded from relitigating the very question which was litigated in the prior action.' Restatement of Judgments, pp. 194-195: Likewise, it is stated in 30 Am. Jur. 945, Sec. 208: 'An adjudication on grounds purely technical, where the merits cannot come into question, is limited to the point actually decided, and does not preclude the maintenance of a subsequent action brought in a way to avoid the objection which proved fatal in the first action. As to the technical point decided, however, the judgment is conclusive, even though it is not conclusive as to the merits of the entire controversy.' See also 50 C.J.S., Judgments, § 638, p. 72; *Redmond v. Republic Steel Corp.*, 238 Mo. App. 647, 186 S.W.2d 51. Thus, as to the question actually decided, in the judgment of dismissal, the judgment is conclusive against plaintiffs even though it was not conclusive on the merits of the cause of action or their right to maintain the action elsewhere."

appellees, by answer or motion for summary judgment, taken proper advantage of this prior adjudication that the cause of action was barred, they could have successfully defeated the state court action brought by appellants after the federal court action failed. But appellees chose to litigate anew the question already decided in their favor by the federal court.

Appellees chose to demur to the complaint. As the majority opinion holds, the federal court decision, not being alleged in the complaint could not have been considered as a prior adjudication *between appellants and appellees* in ruling on the demurrer. Therefore, the trial court and this court were free to decide whether the complaint stated a cause of action under the rules of law applicable in the absence of any prior litigation between the parties. The federal court decision having not been brought into the case as a prior adjudication *between the parties* hereto, was no more than a precedent arising from the adjudication of a similar issue between strangers.

The trial court followed the precedent, but this court quite correctly (I believe) concluded that the federal precedent was an erroneous interpretation of Indiana law. In doing so this court also made an adjudication binding on the parties under a rule known as "the law of the case", which is also a species of *res judicata,* limited, however, to questions of law and to subsequent proceedings in the same case.[3] Our problem is to determine which adjudication controls.

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[3] *Alerding v. Allison*, 170 Ind. 252, 258, 83 N.E. 1006, 127 Am. St. Rep. 363 (1908), *Westfall v. Wait*, 165 Ind. 353, 359, 73 N.E. 1089, 6 Ann. Cas. 788 (1905); 2 Freeman on Judgments (5th Ed.) §§ 630, 639; *Sturgis v. Rogers*, 26 Ind. 1, 14 (1866).

On remand and reconsideration of this case by the court below, a new fact was added to the facts alleged in the complaint on which we held in the first appeal that because Ind. Acts 1961, ch. 287, § 1, applied retroactively appellants' cause of action was not barred by Ind. Acts 1953, Ch. 112, § 1401, Burns IND. STAT. ANN. § 7-801, subsection (a). The new fact was added by an affidavit supporting a motion for summary judgment. The new fact was that it was in a prior *action between the parties to this case,* that the federal court had rendered a final decision that the 1961 act was not retroactive and that the cause of action was barred. I am reluctantly driven to the conclusion, from reading the Indiana authorities,[4] that this new fact put an end to the conclusive force and effect of our prior decision as "the law of the case"—if it was proper for the trial court to consider that new fact in ruling on the motion for summary judgment.

Res judicata is a defense that can be waived[5] and it is my opinion that it was waived by the appellees when they elected to relitigate in the trial court (and in this court), on demurrer, the law question of whether appellants' cause of action was barred by the 1953 statute rather than by properly asserting (by answer or summary judgment motion supported by affidavit) that it was barred because the federal court had already decided that

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[4] *Dodge v. Gaylor,* 53 Ind. 365 (1876); *Davis v. Krug,* 95 Ind. 9; *Buehner Chair Co. v. Feulner,* 164 Ind. 368, 371 73 N.E. 816 (1905); *Alerding v. Allison,* 170 Ind. 252, 260, 83 N.E. 1006 (1907).

[5] *Brown v. Stapleton,* 216 Ind. 387, 391, 24 N.E.2d 909 (1940).

law question against appellants.[6] Therefore the law of *this case* established by our former adjudication is still the law of this case.

I therefore concur in the result reached by the majority.

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[6] "A party cannot rely upon a judicial determination of any issue by way of estoppel, and also upon proof of the facts upon which the determination is based. The necessary effect of the estoppel is to preclude all inquiry as to the truth of the matter determined, and *when a party who is entitled to set up the estoppel opens the inquiry into the truth of the matter he cannot complain that the other party pursues it without regard to* the estoppel". *Megerle v. Ashe*, 33 Cal. 74, 84 (1867). [That case involved truth of facts vs. their prior adjudication. The case at bar involves correctness of a rule of law vs. its prior adjudication. Appellees by their demurrer opened the inquiry into what was the correct rule of law and cannot now complain that appellants pursued that inquiry *without regard* to estoppel by the federal court decision.]

"Before a party can be held conclusively to have waived defense of estoppel by former judgment, he must have assumed a position to inconsistent with the assertion as to amount to an election to abandon it [which appellees did by demurring and permitting an appeal without having asserted the prior adjudication as an estoppel] or proceedings must have reached a stage that the allowance would be inequitable. [The second appeal is such a stage.] *Hickey v. Johnson*, C.C.A. Okl., 9 F.2d 498 . . ." 50 C.J.S. 15, Judgments § 597, note 21.

APPENDIX II

IN THE

SUPREME COURT OF INDIANA

ROBERT SLATER GEORGE SLATER *Appellants,*	)	
v.	)	NO. 668 A 101
MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased,	)	NO. 668 A 102 (Consolidated)
THE COMMUNITY STATE BANK, HUNTINGTON, INDIANA, Administrator of the Estate of Donald H. Stoffel, deceased, *Appellees.*	)	

Petition to Transfer is hereby denied this 6th day of November, 1969. DeBRULER, C. J.

Jur., *Judgments*, § 348, p. 390; 50 C.J.S., *Judgments*, § 627, p. 52. It was therefore error to grant summary judgments by reason of such Federal court judgment.

JUDGMENT

The summary judgments entered herein are reversed and the causes remanded with instructions to overrule appellees' motions for summary judgment, to cause the issues to be closed, and for further proceedings not inconsistent with this opinion.

Pursuant to Acts 1881 (Spec. Sess.), ch. 38, § 652, p. 240, § 2-3237, Burns' 1968 Repl., the appellants shall recover costs.

CONCURRING OPINION

WHITE, J.

While it is true that an adjudication not on the merits does not preclude relitigation of issues not decided (if the objection which proved fatal in the first action can be avoided in a subsequent action[1]) it is nevertheless, con-

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[1] *Griffith v. Bank of New York* (C.A.2d N.Y.), 147 F.2d 899, 160 A.L.R. 1340, cert. den. 325 U.S. 874, 89 L.ed. 1992, 65 S. Ct. 1414, (1945); *Miller v. Milford*, 224 Iowa 753, 276 N.W. 826, 114 A.L.R. 1423, (1937); Re. *Craven*, 178 La. 372, 151 So. 625, 90, A.L.R. 973, (1933); *Healy v. Atchison, T. & S. F.R.Co.* —— Mo. ——, 287 S.W.2d 813; *Chirelstein v. Chirelstein*, 12 N.J. Super 468, 79 A.2d 884, (1951); *Brick v. Cohn-Hall-Marx Co.*, 283 N.Y. 99, 27 N.E. 518; *Converse v. Sickles*, 146 N.Y. 200, 40 N.E. 777, 48 Am. St. Rep. 790; *Hutchings v. Zumbrunn*, 86 Okl. 226, 208 P. 224, (1922); *Gist v. Davis*, 11 S. C. Eq. (2 Hill) 335, 29 Am. Dec. 89; *Peterson v. Morris*, 119 Wash. 335, 205 P. 408. Anno: 11 L. ed. 1059. "A surrogate court's dismissal of a suit to compel an accounting by a trustee whose accounts have been previously approved by a judgment entered upon stipulation of the parties in the Supreme Court is not a bar to a suit in a federal court for damages for breach of trust and for duress in procuring the stipulation upon which the Supreme Court judgment was entered, where the dismissal was for reasons not going to the merits." *Griffith v. Bank of New York* (C.A.2d N.Y.) 147 F.2d 899, 160 A.L.R. 1340, cert. den. 325 U.S. 874, 89 L. ed. 1992, 65 S. Ct. 1414.

clusive as to the points actually decided.[2] The federal court decision was that appellants' cause of action was barred by the six-months limitation of Ind. Acts. 1953, ch. 112, § 1401, Burns IND. STAT. ANN. § 7-801, subsection (a) and that Ind. Acts 1961, ch. 287, § 1, which added subsection (f) creating an exception for tort claims, did not apply to appellants' cause of action which arose in 1959. Thus this federal court decision established a rule of law binding on the parties to this action. Therefore, had

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[2] *Healy v. Atchison, T. & S.F.R.Co.* —— Mo. ——, 287 S.W.2d 813; *Dunseth v. Butte Electric R. Co.*, 41 Mont. 14, 108 P. 567, 21 Ann. Cas. 1258, (1910); *Chirelstein v. Chirelstein*, 12 N.J. Super 468, 79 A.2d 884; *Brick v. Cohn-Hall-Marx Co.*, 283 N.Y. 99, 27 N.E.2d 518. In *Healy v. Atchison, T. & S.F. R. Co., supra* [287 S.W.2d 813, 815 (1956)] the Supreme Court of Missouri said: "Obviously the judgment of dismissal in the first case was not a judgment on the merits of plaintiffs' cause of action; and, therefore, plaintiffs claim the right to commence a new action within one year under authority of Section 516.230. (Statutory references are to RSMo and V.A.M.S.) The trouble with plaintiffs' contention is that as the grounds for dismissal the Court decided plaintiffs had no right to maintain the action in the Circuit Court of the City of St. Louis and they did not appeal. In this situation, the rule is thus stated: 'Where a valid and final personal judgment not on the merits is rendered in favor of the defendant, the plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what is actually decided.' Sec. 49, A.L.I. Restatement of Judgments; see also Sec. 53, especially Comment c. In explanation of this rule, it is stated: 'A judgment for the defendant may be based upon the ground that the plaintiff is not entitled to maintain an action in the State in which the judgment is rendered and not on a ground which would be applicable to an action in other States. In such a case thy judgment is on the merits to the extent that it will bar the plaintiff from maintaining a further action in that State, but it is not on the merits so far as actions in other States are concerned. * * * Although, where the judgment for the defendant is not on the merits, the plaintiff is not precluded from maintaining a new action on the same cause of action, he is precluded from relitigating the very question which was litigated in the prior action.' Restatement of Judgments, pp. 194-195: Likewise, it is stated in 30 Am. Jur. 945, Sec. 208: 'An adjudication on grounds purely technical, where the merits cannot come into question, is limited to the point actually decided, and does not preclude the maintenance of a subsequent action brought in a way to avoid the objection which proved fatal in the first action. As to the technical point decided, however, the judgment is conclusive, even though it is not conclusive as to the merits of the entire controversy.' See also 50 C.J.S., Judgments, § 638, p. 72; *Redmond v. Republic Steel Corp.*, 238 Mo. App. 647, 186 S.W.2d 51. Thus, as to the question actually decided, in the judgment of dismissal, the judgment is conclusive against plaintiffs even though it was not conclusive on the merits of the cause of action or their right to maintain the action elsewhere."

appellees, by answer or motion for summary judgment, taken proper advantage of this prior adjudication that the cause of action was barred, they could have successfully defeated the state court action brought by appellants after the federal court action failed. But appellees chose to litigate anew the question already decided in their favor by the federal court.

Appellees chose to demur to the complaint. As the majority opinion holds, the federal court decision, not being alleged in the complaint could not have been considered as a prior adjudication *between appellants and appellees* in ruling on the demurrer. Therefore, the trial court and this court were free to decide whether the complaint stated a cause of action under the rules of law applicable in the absence of any prior litigation between the parties. The federal court decision having not been brought into the case as a prior adjudication *between the parties* hereto, was no more than a precedent arising from the adjudication of a similar issue between strangers.

The trial court followed the precedent, but this court quite correctly (I believe) concluded that the federal precedent was an erroneous interpretation of Indiana law. In doing so this court also made an adjudication binding on the parties under a rule known as "the law of the case", which is also a species of *res judicata,* limited, however, to questions of law and to subsequent proceedings in the same case.[3] Our problem is to determine which adjudication controls.

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[3] *Alerding v. Allison*, 170 Ind. 252, 258, 83 N.E. 1006, 127 Am. St. Rep. 363 (1908), *Westfall v. Wait*, 165 Ind. 353, 359, 73 N.E. 1089, 6 Ann. Cas. 788 (1905); 2 Freeman on Judgments (5th Ed.) §§ 630, 639; *Sturgis v. Rogers*, 26 Ind. 1, 14 (1866).

On remand and reconsideration of this case by the court below, a new fact was added to the facts alleged in the complaint on which we held in the first appeal that because Ind. Acts 1961, ch. 287, § 1, applied retroactively appellants' cause of action was not barred by Ind. Acts 1953, Ch. 112, § 1401, Burns IND. STAT. ANN. § 7-801, subsection (a). The new fact was added by an affidavit supporting a motion for summary judgment. The new fact was that it was in a prior *action between the parties to this case,* that the federal court had rendered a final decision that the 1961 act was not retroactive and that the cause of action was barred. I am reluctantly driven to the conclusion, from reading the Indiana authorities,[4] that this new fact put an end to the conclusive force and effect of our prior decision as "the law of the case"—if it was proper for the trial court to consider that new fact in ruling on the motion for summary judgment.

Res judicata is a defense that can be waived[5]—and it is my opinion that it was waived by the appellees when they elected to relitigate in the trial court (and in this court), on demurrer, the law question of whether appellants' cause of action was barred by the 1953 statute rather than by properly asserting (by answer or summary judgment motion supported by affidavit) that it was barred because the federal court had already decided that

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[4] *Dodge v. Gaylor*, 53 Ind. 365 (1876); *Davis v. Krug*, 95 Ind. 9; *Buehner Chair Co. v. Feulner*, 164 Ind. 368, 371 73 N.E. 816 (1905); *Alerding v. Allison*, 170 Ind. 252, 260, 83 N.E. 1006 (1907).

[5] *Brown v. Stapleton*, 216 Ind. 387, 391, 24 N.E.2d 909 (1940).

law question against appellants.[6] Therefore the law of *this case* established by our former adjudication is still the law of this case.

I therefore concur in the result reached by the majority.

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[6] "A party cannot rely upon a judicial determination of any issue by way of estoppel, and also upon proof of the facts upon which the determination is based. The necessary effect of the estoppel is to preclude all inquiry as to the truth of the matter determined, and *when a party who is entitled to set up the estoppel opens the inquiry into the truth of the matter he cannot complain that the other party pursues it without regard to* the estoppel". *Megerle v. Ashe*, 33 Cal. 74, 84 (1867). [That case involved truth of facts vs. their prior adjudication. The case at bar involves correctness of a rule of law vs. its prior adjudication. Appellees by their demurrer opened the inquiry into what was the correct rule of law and cannot now complain that appellants pursued that inquiry *without regard* to estoppel by the federal court decision.]

"Before a party can be held conclusively to have waived defense of estoppel by former judgment, he must have assumed a position to inconsistent with the assertion as to amount to an election to abandon it [which appellees did by demurring and permitting an appeal without having asserted the prior adjudication as an estoppel] or proceedings must have reached a stage that the allowance would be inequitable. [The second appeal is such a stage.] *Hickey v. Johnson*, C.C.A. Okl., 9 F.2d 498 . . ." 50 C.J.S. 15, Judgments § 597, note 21.

APPENDIX II

IN THE

SUPREME COURT OF INDIANA

ROBERT SLATER GEORGE SLATER *Appellants,*	)	
v.	)	NO. 668 A 101
MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased,	)	NO. 668 A 102 (Consolidated)
THE COMMUNITY STATE BANK, HUNTINGTON, INDIANA, Administrator of the Estate of Donald H. Stoffel, deceased, *Appellees.*	)	

Petition to Transfer is hereby denied this 6th day of November, 1969. DeBRULER, C. J.

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

ROBERT SLATER, by George Slater, his Father and Next Friend, *Plaintiff,* v. MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased, and THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased, *Defendants.*	CIVIL NO. 1196

ORDER GRANTING MOTIONS OF DEFENDANTS FOR RETURN OF DEFENDANTS' CASH DEPOSIT MADE TO SECURE APPEAL BOND AND FOR SUMMARY JUDGMENT

The captioned matter is now before the Court on motions of defendants (1) To Require Plaintiff to Increase Security for Costs, (2) For Return of Defendants' Cash Deposit Made to Secure Appeal Bond, and (3) For Summary Judgment. In regard to defendants' first motion, the de-

fendants have agreed that since plaintiff's counsel agreed to assume personal liability for costs, the question may be withdrawn from the Court's consideration. In regard to the second motion, the defendants have fully complied with the condition of their appeal bond, having prosecuted their appeal promptly and having reversed the prior order of this court by such appeal. No costs were taxed against defendants in prosecuting their appeal, but were taxed against plaintiff instead. Certiorari was denied by the Supreme Court of the United States on October 14, 1963. Having fully complied with the condition of the appeal bond, the same is now void and defendants are entitled to a refund of their cash deposit securing same.

Defendants' motion for summary judgment is based upon the decision of the Court of Appeals for the Seventh Circuit in the case of *Slater v. Stoffel,* 313 F. 2d 175 (7th Cir. 1963), which reversed the decision of the United States District Court for the Northern District of Indiana rendered in *Slater v. Stoffel,* 206 F. Supp. 534 (N.D. Ind. 1962). This case grew out of an automobile accident which occurred on June 6, 1959 in Huntington County, Indiana, wherein defendants' decedents were killed. Plaintiff's right of action against the administrators of decedents' estates is based upon the Indiana "Survival Statute," Ind. Ann. Stat. § 2-403 (Burns Cum. Supp. 1963). The statute provides in part:

> ". . . If any action has been commenced against the decedent prior to his death, the same shall continue by substituting his personal representatives as in other actions surviving the defendant's death; in event the action be brought subsequent to the death of the party against whom the cause existed, *then the same shall be prosecuted as other claims against said decedent's estate. . . .*" (Emphasis added)

In regard to prosecuting claims against a decedent's estate, Ind. Ann. Stat. § 7-801(a) (Burns 1953 Repl. Ed.) provides, in substance, that all claims against a decedent's estate, other than those of administration and claims of the United States, shall be forever barred unless filed with the court in which such estate is being administered within six months after the date of the first published notice to creditors. Section 7-802 further provides that no action shall be brought by complaint and summons against the personal representative of an estate, but that the holder of a claim shall file a "succinct definite statement thereof in the office of the clerk of the court in which the estate is pending." Said statute also provides that such claim must be accompanied by affidavit stating that the claim is justly due and unpaid. The first publication of notice to creditors was made on July 16, 1959 as to the estate of Bernard J. Stoffel and on December 2, 1959 as to the estate of Donald H. Stoffel. Plaintiff filed this complaint in the United States District Court for the Northern District of Indiana, Fort Wayne Division, on December 2, 1959, However, plaintiff has never filed a statement of his claim with the clerk of the Huntington Circuit Court, the court in which the estate is pending. Having failed to file any such claim within the six-month statutory period of either estate, plaintiff's claim is barred, and the Circuit Court of Appeals for the Seventh Circuit has so held. *Slater v. Stoffel*, supra. Plaintiff, in his answer brief in opposition to defendants' motion for summary judgment, contends further that under admendments to § 7-801 and § 7-802, effective July 6, 1961, which exempt tort claims from the six-month statute of limitations, plaintiff, being a minor at the time of the accident in question, has until two years after his twenty-first birthday to bring any such tort action against the estates in question and that such

time has not yet expired. Ind. Ann. Stat. § 2-605 (Burns 1946 Repl. Ed.) provides that any person under a legal disability when a cause of action accrues may bring an action within two years after the disability is removed. However, the amendments referred to above became effective July 6, 1961, and the plaintiff's cause of action accrued June 6, 1959. Therefore, the amendments do not apply to this cause of action, and the same has been so held by this court in its previous order in this case, which holding was not disturbed by the reversing opinion of the Court of Appeals for the Seventh Circuit. Plaintiff so conceded that the amendments did not apply in his argument before this Court. Plaintiff's contention in this regard is therefore without merit.

In light of the decision of the Court of Appeals for the Seventh Circuit and the subsequent denial of a petition for a writ of certiorari thereof by the Supreme Court of the United States, the defendants are entitled to summary judgment in this matter.

Accordingly, the motions of the defendants for return of defendants' cash deposit made to secure appeal bond and for summary judgment should be, and the same hereby are, granted, and the clerk of this court is now directed to enter judgment in favor of the defendant and against the plaintiff.

Dated this 20th day of November, 1963.

/s/ Jesse E. Eschbach

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

GEORGE SLATER, *Plaintiff,*	)	
v.	)	CIVIL NO. 1197
MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased, and	)	
THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator, of the Estate of Donald H. Stoffel, deceased, *Defendants.*	)	

ORDER GRANTING MOTIONS OF DEFENDANTS FOR RETURN OF DEFENDANTS' CASH DEPOSIT MADE TO SECURE APPEAL BOND AND FOR SUMMARY JUDGMENT

The captioned matter is now before the Court on motions of defendants (1) To Require Plaintiff to Increase Security for Costs, (2) For Return of Defendants' Cash Deposit Made to Secure Appeal Bond, and (3) For Summary Judgment. In regard to defendants' first motion, the defendants have agreed that since plaintiff's counsel agreed to assume personal liability for costs, the question may be withdrawn from the Court's consideration. In regard to the second motion, the defendants have fully complied with the condition of their appeal bond. No costs were taxed against defendants in prosecuting their appeal,

but were taxed against plaintiff instead. Certiorari was denied by the Supreme Court of the United States on October 14, 1963. Having fully complied with the condition of the appeal bond, the same is now void, and defendants are entitled to a refund of their cash deposit securing same.

Defendants' motion for summary judgment is based upon the decision of the Court of Appeals for the Seventh Circuit in the case of *Slater v. Stoffel,* 313 F. 2d 175 (7th Cir. 1963), which reversed the decision of the United States District Court for the Northern District of Indiana rendered in *Slater v. Stoffel,* 206 F. Supp. 534 (N.D. Ind. 1962). This case grew out of an automobile accident which occurred on June 6, 1959, in Huntington County, Indiana, wherein defendants' decedents were killed. Plaintiff's right of action against the administrators of decedents' estates is based upon the Indiana "Survival Statute," Ind. Ann. Stat. § 2-403 (Burns Cum. Supp. 1963). The statute provides in part:

> ". . . If any action has been commenced against the decedent prior to his death, the same shall continue by substituting his personal representatives as in other actions surviving the defendant's death; in event the action be brought subsequent to the death of the party against whom the cause existed, *then the same shall be prosecuted as other claims against said decedent's estate....*" (Emphasis added)

In regard to prosecuting claims against a decedent's estate, Ind. Ann. Stat. § 7-801(a) (Burns 1953 Repl. Ed.) provides, in substance, that all claims against a decedent's estate, other than those of administration and claims of the United States, shall be forever barred unless filed with the court in which such estate is being administered within

six months after the date of the first published notice to creditors. Section 7-802 further provides that no action shall be brought by complaint and summons against the personal representative of an estate, but that the holder of a claim shall file a "succinct definite statement thereof in the office of the clerk of the court in which the estate is pending" and that such claim must be accompanied by an affidavit stating that the claim is justly due and unpaid. The first publication of notice of creditors was made on July 16, 1959 as to the estate of Bernard J. Stoffel and on December 2, 1959 as to the estate of Donald H. Stoffel. Plaintiff filed this complaint in the United States District Court for the Northern District of Indiana, Fort Wayne Division, on December 2, 1959. However, there is nothing in the record before this Court to indicate, other than a statement of claim for property damage to his automobile, that plaintiff has filed any statement of claim with the clerk of the Huntington Circuit Court, the court in which the estate is pending. Plaintiff having failed to file a claim such as is required by the statutes of the State of Indiana and the opinion of the United States Court of Appeals for the Seventh Circuit with the clerk of the Huntington Circuit Court within the six-month statutory period of either estate, his claim is barred. *Slater v. Stoffel,* supra. In light of this decision and the subsequent denial of a petition for a writ of certiorari thereof by the Supreme Court of the United States, the defendants are deemed entitled to summary judgment in this matter.

Accordingly, the motions of defendants for return of defendants' cash deposit made to secure appeal bond and for summary judgment should be, and the same hereby are, granted, and the clerk of this court is now directed to

enter judgment in favor of the defendant and against the plaintiff.

Dated this 20th day of November, 1963.

/s/ Jesse E. Eschbach

United States District Judge

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

ROBERT SLATER, by George Slater, his Father and Next Friend, *Plaintiff,* v. MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased, and THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased, *Defendants.*	CIVIL NO. 1196

ORDER GRANTING MOTIONS OF DEFENDANTS FOR RETURN OF DEFENDANTS' CASH DEPOSIT MADE TO SECURE APPEAL BOND AND FOR SUMMARY JUDGMENT

The captioned matter is now before the Court on motions of defendants (1) To Require Plaintiff to Increase Security for Costs, (2) For Return of Defendants' Cash Deposit Made to Secure Appeal Bond, and (3) For Summary Judgment. In regard to defendants' first motion, the de-

fendants have agreed that since plaintiff's counsel agreed to assume personal liability for costs, the question may be withdrawn from the Court's consideration. In regard to the second motion, the defendants have fully complied with the condition of their appeal bond, having prosecuted their appeal promptly and having reversed the prior order of this court by such appeal. No costs were taxed against defendants in prosecuting their appeal, but were taxed against plaintiff instead. Certiorari was denied by the Supreme Court of the United States on October 14, 1963. Having fully complied with the condition of the appeal bond, the same is now void and defendants are entitled to a refund of their cash deposit securing same.

Defendants' motion for summary judgment is based upon the decision of the Court of Appeals for the Seventh Circuit in the case of *Slater v. Stoffel,* 313 F. 2d 175 (7th Cir. 1963), which reversed the decision of the United States District Court for the Northern District of Indiana rendered in *Slater v. Stoffel,* 206 F. Supp. 534 (N.D. Ind. 1962). This case grew out of an automobile accident which occurred on June 6, 1959 in Huntington County, Indiana, wherein defendants' decedents were killed. Plaintiff's right of action against the administrators of decedents' estates is based upon the Indiana "Survival Statute," Ind. Ann. Stat. § 2-403 (Burns Cum. Supp. 1963). The statute provides in part:

> ". . . If any action has been commenced against the decedent prior to his death, the same shall continue by substituting his personal representatives as in other actions surviving the defendant's death; in event the action be brought subsequent to the death of the party against whom the cause existed, *then the same shall be prosecuted as other claims against said decedent's estate. . . .*" (Emphasis added)

In regard to prosecuting claims against a decedent's estate, Ind. Ann. Stat. § 7-801(a) (Burns 1953 Repl. Ed.) provides, in substance, that all claims against a decedent's estate, other than those of administration and claims of the United States, shall be forever barred unless filed with the court in which such estate is being administered within six months after the date of the first published notice to creditors. Section 7-802 further provides that no action shall be brought by complaint and summons against the personal representative of an estate, but that the holder of a claim shall file a "succinct definite statement thereof in the office of the clerk of the court in which the estate is pending." Said statute also provides that such claim must be accompanied by affidavit stating that the claim is justly due and unpaid. The first publication of notice to creditors was made on July 16, 1959 as to the estate of Bernard J. Stoffel and on December 2, 1959 as to the estate of Donald H. Stoffel. Plaintiff filed this complaint in the United States District Court for the Northern District of Indiana, Fort Wayne Division, on December 2, 1959, However, plaintiff has never filed a statement of his claim with the clerk of the Huntington Circuit Court, the court in which the estate is pending. Having failed to file any such claim within the six-month statutory period of either estate, plaintiff's claim is barred, and the Circuit Court of Appeals for the Seventh Circuit has so held. *Slater v. Stoffel,* supra. Plaintiff, in his answer brief in opposition to defendants' motion for summary judgment, contends further that under admendments to § 7-801 and § 7-802, effective July 6, 1961, which exempt tort claims from the six-month statute of limitations, plaintiff, being a minor at the time of the accident in question, has until two years after his twenty-first birthday to bring any such tort action against the estates in question and that such

time has not yet expired. Ind. Ann. Stat. § 2-605 (Burns 1946 Repl. Ed.) provides that any person under a legal disability when a cause of action accrues may bring an action within two years after the disability is removed. However, the amendments referred to above became effective July 6, 1961, and the plaintiff's cause of action accrued June 6, 1959. Therefore, the amendments do not apply to this cause of action, and the same has been so held by this court in its previous order in this case, which holding was not disturbed by the reversing opinion of the Court of Appeals for the Seventh Circuit. Plaintiff so conceded that the amendments did not apply in his argument before this Court. Plaintiff's contention in this regard is therefore without merit.

In light of the decision of the Court of Appeals for the Seventh Circuit and the subsequent denial of a petition for a writ of certiorari thereof by the Supreme Court of the United States, the defendants are entitled to summary judgment in this matter.

Accordingly, the motions of the defendants for return of defendants' cash deposit made to secure appeal bond and for summary judgment should be, and the same hereby are, granted, and the clerk of this court is now directed to enter judgment in favor of the defendant and against the plaintiff.

Dated this 20th day of November, 1963.

/s/ Jesse E. Eschbach

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

GEORGE SLATER, *Plaintiff,*	)	
v.	)	CIVIL NO. 1197
MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased, and	)	
THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator, of the Estate of Donald H. Stoffel, deceased, *Defendants.*	)	

ORDER GRANTING MOTIONS OF DEFENDANTS FOR RETURN OF DEFENDANTS' CASH DEPOSIT MADE TO SECURE APPEAL BOND AND FOR SUMMARY JUDGMENT

The captioned matter is now before the Court on motions of defendants (1) To Require Plaintiff to Increase Security for Costs, (2) For Return of Defendants' Cash Deposit Made to Secure Appeal Bond, and (3) For Summary Judgment. In regard to defendants' first motion, the defendants have agreed that since plaintiff's counsel agreed to assume personal liability for costs, the question may be withdrawn from the Court's consideration. In regard to the second motion, the defendants have fully complied with the condition of their appeal bond. No costs were taxed against defendants in prosecuting their appeal,

but were taxed against plaintiff instead. Certiorari was denied by the Supreme Court of the United States on October 14, 1963. Having fully complied with the condition of the appeal bond, the same is now void, and defendants are entitled to a refund of their cash deposit securing same.

Defendants' motion for summary judgment is based upon the decision of the Court of Appeals for the Seventh Circuit in the case of *Slater v. Stoffel,* 313 F. 2d 175 (7th Cir. 1963), which reversed the decision of the United States District Court for the Northern District of Indiana rendered in *Slater v. Stoffel,* 206 F. Supp. 534 (N.D. Ind. 1962). This case grew out of an automobile accident which occurred on June 6, 1959, in Huntington County, Indiana, wherein defendants' decedents were killed. Plaintiff's right of action against the administrators of decedents' estates is based upon the Indiana "Survival Statute," Ind. Ann. Stat. § 2-403 (Burns Cum. Supp. 1963). The statute provides in part:

> ". . . If any action has been commenced against the decedent prior to his death, the same shall continue by substituting his personal representatives as in other actions surviving the defendant's death; in event the action be brought subsequent to the death of the party against whom the cause existed, *then the same shall be prosecuted as other claims against said decedent's estate....*" (Emphasis added)

In regard to prosecuting claims against a decedent's estate, Ind. Ann. Stat. § 7-801(a) (Burns 1953 Repl. Ed.) provides, in substance, that all claims against a decedent's estate, other than those of administration and claims of the United States, shall be forever barred unless filed with the court in which such estate is being administered within

six months after the date of the first published notice to creditors. Section 7-802 further provides that no action shall be brought by complaint and summons against the personal representative of an estate, but that the holder of a claim shall file a "succinct definite statement thereof in the office of the clerk of the court in which the estate is pending" and that such claim must be accompanied by an affidavit stating that the claim is justly due and unpaid. The first publication of notice of creditors was made on July 16, 1959 as to the estate of Bernard J. Stoffel and on December 2, 1959 as to the estate of Donald H. Stoffel. Plaintiff filed this complaint in the United States District Court for the Northern District of Indiana, Fort Wayne Division, on December 2, 1959. However, there is nothing in the record before this Court to indicate, other than a statement of claim for property damage to his automobile, that plaintiff has filed any statement of claim with the clerk of the Huntington Circuit Court, the court in which the estate is pending. Plaintiff having failed to file a claim such as is required by the statutes of the State of Indiana and the opinion of the United States Court of Appeals for the Seventh Circuit with the clerk of the Huntington Circuit Court within the six-month statutory period of either estate, his claim is barred. *Slater v. Stoffel,* supra. In light of this decision and the subsequent denial of a petition for a writ of certiorari thereof by the Supreme Court of the United States, the defendants are deemed entitled to summary judgment in this matter.

Accordingly, the motions of defendants for return of defendants' cash deposit made to secure appeal bond and for summary judgment should be, and the same hereby are, granted, and the clerk of this court is now directed to

enter judgment in favor of the defendant and against the plaintiff.

Dated this 20th day of November, 1963.

/s/ Jesse E. Eschbach

United States District Judge

APPENDIX IV

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 13812-3 SEPTEMBER TERM 1962—
JANUARY SESSION 1963

GEORGE SLATER,
Plaintiff-Appellee,
v.
No. 13812
MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased, and THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

ROBERT SLATER, by George Slater, his Father, as Next Friend,
Plaintiff-Appellee,
v.
No. 13813
MARK E. STOFFEL, Administrator, of the Estate of Bernard J. Stoffel, deceased, and THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

February 8, 1963

Before DUFFY, CASTLE and KILEY, Circuit Judges.

DUFFY, Circuit Judge. On June 6, 1959, an automobile collision occurred on a public highway in Huntington County, Indiana. One of the motor vehicles involved was driven by George Slater, a resident of the State of Georgia. His son, Robert Slater, was, at said time and place, a passenger in the Slater automobile.

The other motor vehicle involved in the collision was operated by either Bernard J. Stoffel or Donald H. Stoffel, both of whom were killed in the collision. The Stoffels were residents of Huntington County, Indiana.

Mark E. Stoffel was appointed administrator of the Bernard J. Stoffel estate by the Huntington Circuit Court. The first publication of notice to creditors was made on July 16, 1959. The Community State Bank, Huntington, Indiana, was appointed administrator of the estate of Donald H. Stoffel. The first publication of notice to creditors in this estate was made on December 2, 1959.

On December 2, 1959, George Slater, as plaintiff in suit No. 13812, and Robert Slater, by George Slater, his father and next friend, as plaintiff in suit No. 13813, filed actions for damages in the United States District Court for the Northern District of Indiana. The defendants named in each suit were the administrators of the two Stoffel estates. Each suit was based on diversity of citizenship with requisite amount in controversy.

The principal issue on each appeal before us is whether plaintiffs may maintain these actions in a United States District Court without first complying with the requirements of § 7-801 and § 7-802, Burns' Indiana Stat. (1953 Repl. Ed.).

Section 7-801(a) contains the statute of limitations on filing claims against a decedent's estate. In pertinent part

it provides: "All claims against a decedent's estate . . . shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court . . . within six (6) months after the date of the first published notice to creditors."

Section 7-802 provides, in part: "No action shall be brought by complaint and summons against the personal representative of an estate for the recovery . . . against the decedent, or his estate, but the holder thereof . . . shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending . . . the statement . . . shall be accompanied by the affidavit of the claimant, his agent or attorney . . . and no claim shall be received unless accompanied by such affidavit. . . ."

The Indiana Survival Statute, § 2-403, Burns' Indiana Stat. (1962 Cum. Supp.) provides: "All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the representative of the deceased party . . . in event the action be brought subsequent to the death of the party against whom the cause existed, then the same shall be prosecuted as other claims against said decedent's estate."

It is admitted that neither plaintiff filed a claim together with the required statutory affidavit against the estate of either of the decedents pursuant to §§ 7-801 and 7-802, Burns' Indiana Stat. (1953 Repl. Ed.). However, it is established that each plaintiff did file his complaint in the United States District Court within the six months period provided by § 7-801(a).

Defendants, by amended answers, allege the United States District Court had no jurisdiction of the subject matter of the action because jurisdiction thereof was vested exclusively in the Huntington Circuit Court; that plaintiffs' claims were barred by the statute of limitations because plaintiffs failed to file their claims as required by § 7-801(a), Burns' Indiana Stat. (1953 Repl. Ed.); that §§ 7-801 and 7-802 are not merely acts of limitation but constitute the denial of a right of action and impose conditions precedent.

Plaintiffs moved to strike the affirmative defenses. The Court sustained the motions to strike and an order striking the defenses was entered. The Court found the order involved a controlling question of law as to which there is substantial ground for a difference of opinion, and that an immediate appeal from the interlocutory order might materially advance the termination of the litigation. This Court granted leave to appeal. 28 U. S. C. § 1292(b).

Inasmuch as Bernard Stoffel and Donald Stoffel died at the time of the collision or shortly thereafter, it is clear that plaintiffs could not have brought a suit for damages against them or their estates or personal representatives except for a right created by the State of Indiana. This is the right under the so-called "Survival Statute", § 2-403, Burns' Indiana Stat. (1962 Cum. Supp.). An important provision of this statute to be kept in mind is: "[I]n event the action be brought subsequent to the death of the party against whom the cause existed, then the same shall be prosecuted as other claims against said decedent's estate."

Here, a federal court, by reason of diversity of citizenship, is asked to adjudicate a state-created right. The

plaintiffs' exercise of that right is subject to the terms and conditions specified by the Indiana statute.

In *Guaranty Trust Co. v. York,* 326 U. S. 99, 108-109, the Supreme Court said: ". . . But since a federal court adjudicating a State-created right, solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."

In *Angel v. Bullington,* 330 U. S. 183, 191-2, the Court stated: ". . . The essence of diversity jurisdiction is that a federal court enforces State law and State policy. . . . What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens."

This Court, in *Allstate Insurance Company v. Charneski,* 286 F. 2d 238, in an opinion by Chief Judge Hastings, after discussing and analyzing several of the most pertinent Supreme Court decisions, said, at page 243: "In summary, federal courts in diversity cases have applied the *Erie* doctrine to state conflict of law rules, state statutes of limitations, state burden of proof rules, state precedent as to contributory negligence, state court-closing statutes, and even as in *Ragan v. Merchants Transfer & Warehouse Co., supra* (337 U. S. 530) to giving precedence to state procedural statutes dealing with service of process over the Federal Rules of Civil Procedure."

Plaintiffs argue that the statutory provisions, §§ 7-801 and 7-802 are not conditions precedent except for the six months statute of limitations. However, Indiana courts have stated the provisions of these statutes are conditions precedent. In *Otolski v. Nowicki,* 129 Ind. App. 492, 158 N. E. 2d 296, the Court stated (N. E. 298): ". . . A statute of this type has been referred to as not being a statute limiting the remedy or, in other words, a statute of limitation, but as a statute constituing a denial of a right of action and imposing a condition precedent to the enforcement of such right of action."

To the same effect are *Bahr v. Zahm et al.,* 219 Ind. 297, 37 N. E. 2d 942, 944; *Lewis v. Estate of Smith et al.,* 130 Ind. App. 390, 162 N. E. 2d 457, 458; and *Russell v. Moore et al.,* 130 Ind. App. 351, 164 N. E. 2d 670, 673.

It is conceded that citizens of Indiana, in order to recover from an administrator of a decedent on a tort claim, would be required not only to file a claim within six months, but also to comply with the other provisions of §§ 7-801 and 7-802.

The trial judge recognized that plaintiffs were required to comply with the laws of Indiana, but he engrafted an exception as follows: ". . . [E]xcept that plaintiffs cannot be barred or precluded from their selection of the federal court as their forum where concurrent jurisdiction exists with the state court."

The basis of the trial court's decision appears in this sentence: "Therefore, it is the opinion of this Court that plaintiffs complied with the Indiana law to the extent that they could do so without materially interfering or jeopardizing their right to select this court as their forum."

Plaintiffs strongly urge that if they had filed claims and affidavits with the clerk of the State court as provided in §§ 7-801 and 7-802, they would have locked themselves in the State court and would have thus been precluded from later filing suit in the federal court. Reference is made to § 7-810, Burns' Indiana Stat. (1953 Repl. Ed.) which provides that when the personal representative disallowed the claim, it is automatically transferred to the trial docket of the State court.

Defendants claim that plaintiffs, by filing suit in the federal court without complying with § 7-802, have deprived them of the opportunity granted by the Indiana Statute of investigating the merits of plaintiffs' claims and of making a decision with respect to the payment thereof without the delay and expense of litigation. Also, that defendants never have been presented with an affidavit in any form, and that even the complaints were not verified. Of course, plaintiffs were permitted to file unverified complaints under the federal practice.

We think it was for the State of Indiana to specify as to what must be presented to constitute a valid claim. Plaintiffs' position is unique in suggesting that the notice requirement was to be complied with in some way but that the affidavit requirement could be ignored.

Plaintiffs seem to argue that if they complied with the Indiana statutes hereinbefore quoted, they would necessarily be held to have elected their remedy and forum in the state court. We do not think this position is well taken.

Courts, in many states, have held that filing a claim against an estate will not be regarded as an election of remedies. To illustrate: In *Coffey v. Durand et al.*, 167 S. W. 2d 684 (Tenn.) the Court said at page 688: "It is generally held that the filing of a claim against the estate

of a decedent will not be regarded as an election of remedies, precluding the claimant from pursuing other remedies not inconsistent with the filing of such claim. The mere presentation of a claim against an estate, without prosecuting it to final determination, will not be taken as an election to pursue that remedy and no other. See 21 Am. Jur., 601, Sec. 387 and notes."

Defendants' counsel suggests a course which plaintiffs could have followed, to-wit: "Plaintiffs could have filed their notices of claim, together with the required statutory affidavits, with the Clerk of The Huntington Circuit Court within the time allowed by § 7-801(a), Burns' Ind. Stats. (1953 Repl. Ed.), noting therein that diversity of citizenship existed between plaintiffs and the personal representatives and stating plaintiffs' intention to prosecute actions in the Federal Court in the event the claims were rejected. . . ."

We do not pass upon the suggestion thus made, but will quote from the decision of this Court in *Woods v. Klobuchar,* 157 F. 2d 313, where we considered the same Indiana statutes which have been heretofore referred to in this opinion. In the *Woods* case, we said, page 315: "Plaintiff concedes that if he were a citizen of Indiana he would have had to comply with §§ 7-801(a) and 7-802 and having failed to do so, would have lost his right of action. In other words he admits that on December 31, 1954 his action was forever barred in the state courts of Indiana. He, however, contends that he cannot be deprived of his right to have his case tried in a federal court. With this we agree, however, compliance with §§ 7-801(a) and 7-802 in accordance with the mandate of § 2-403 does not preclude a qualified non-resident claimant from having his claim litigated in the federal court upon transfer to the

civil trial docket pursuant to § 7-810. It is not for us to here chart in detail such a course."

We hold the District Court erred in sustaining the motions of the plaintiffs to strike the affirmative defenses, based upon plaintiffs' failure to comply with §§ 7-801 and 7-802, Burns' Indiana Stat. (1953 Repl. Ed.).

The order granting the motion to strike is

REVERSED.

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

ROBERT SLATER, *Plaintiff;*	)	
vs	)	CIVIL NO. 1196
MARK E. STOFFEL, Admr., et al., *Defendants,*	)	
GEORGE SLATER, *Plaintiff,*	)	
vs	)	CIVIL NO. 1197
MARK E. STOFFEL, Admr., et al., *Defendants.*	)	

ORDER

These cases, consolidated for the purposes of trial, are presently before the Court on plaintiffs' motions to strike paragraphs 2, 3, 4, and 5 of defendants' answers. Due to the nature of the question of law raised by plaintiffs' motions, it is appropriate to include an analysis of the problem and the relevant authorities. However, before doing so, a brief recital of the salient facts is necessary to an appreciation of the question raised.

In this action, plaintiffs are seeking to recover for personal injuries and loss of services thereby resulting from a collision between their vehicle and another vehicle operated by one or the other of defendants' decedents whose demises were occasioned by the tragic event. The collision occurred on June 6, 1959, within the State of Indiana. Plaintiffs filed their complaint in the above-entitled cause in this court on December 2, 1959, and defendants were served on December 8, 1959, within six months after the respective appointments of the defendants herein as administrators and publication of notice to creditors, pursuant to Ind. Stat. Ann. Sec. 7-107 (Burns, 1962 Pocket Supp.), the then applicable statute. This court's jurisdiction of the above-entitled cause is based solely upon diversity of citizenship existing between the parties.

The parties by their pleadings and briefs agree that plaintiffs' right of action is governed by the law of the State of Indiana in its substantive aspects. Defendants' second, third, fourth, and fifth defenses are substantially similar in that they proceed upon the theory that plaintiffs' claims are barred because they were not filed in the Indiana State Court within the statutory time limit and that plaintiffs have failed to comply with the statutory "conditions precedent" to bringing their actions. Therefore, a consideration of the pertinent Indiana statutes is appropriate, noting at the outset that plaintiffs are suing defendants who are amenable to this suit in their representative capacity as the administrators of the estates of the alleged deceased tortfeasors. Ind. Stat. Ann. Sec. 2-403 (Burns, 1962 Pocket Supp.) provides in pertinent part as follows:

> "All causes of action shall survive, and may be brought, notwithstanding the death of the person en-

titled or liable to such action, by or against the representative of the deceased party, . . .

". . . in event the action be brought subsequent to the death of the party against whom the cause existed, then the same shall be prosecuted as other claims against said decedent's estate."

Ind. Stat. Ann. Sec. 7-801(a) (Burns, 1953 Repl.) contends the statute of limitations on filing claims against a decedent's estate, which was in force on June 6, 1959, the date upon which plaintiffs' cause of action arose, and provided in pertinent part as follows:

"All claims against a decedents' estate, . . ., shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed within six (6) months after the date of the first published notice to creditors."

Also in force on the date upon which plaintiffs' cause of action arose was Ind. Stat. Ann. Sec. 7-802 (Burns, 1953 Repl.) which provided in pertinent part as follows:

"No action shall be brought by complaint and summons against the personal representative of an estate for the recovery of any claim against the decedent or his estate, but the holder thereof, . . ., shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending; . . .; the statement . . . shall be accompanied by the affidavit of the claimant, his agent or attorney, . . ., and no claim shall be received unless accompanied by such affidavit; . . ."

Finally, Ind. Stat. Ann. Sec. 7-810 (Burns, 1953 Repl.) which was in force on the date upon which plaintiffs' cause of action arose provided in pertinent part as follows:

"All claims which are disallowed, or which are neither allowed or disallowed within said period of six (6)

months and fifteen (15) days shall be transferred at once to the issue docket for trial . . ."

It should be noted concerning sections 7-801 and 7-802, supra, that by amendment, effective July 6, 1961, claims arising out of tort are no longer subject to the six months statute of limitations, or the notice procedure required by said sections, so that the precise legal questions regarding Indiana law raised by plaintiffs' motions to strike will not again become material to a federal court in regard to actions accruing after July 6, 1961. However, the July 6, 1961 amendment does not affect the case at bar.

It is established that plaintiffs filed their complaint in the above-entitled cause in this court within the six months period provided by section 7-801, supra; however, they filed no claim against the estates for the personal injuries which they allege with the clerk of the state court in which the estates of defendants' decedents were pending, as required by section 7-802, supra, and the time for doing so has long since expired. The legal question presented, therefore, is to what extent should plaintiffs be required to comply with sections 7-801 and 7-802, supra, for the purpose of tolling the state statute of limitations and enabling them to maintain the instant action in a Federal District Court, which cause of action exists solely by reason of state created rights. Ind. Stat. Ann. Sec. 7-802 (Burns, 1953 Repl.)

There can be no question that plaintiffs who seek to assert a state created right in a Federal District Court where jurisdiction is founded solely upon diversity of citizenship can be placed in no better position than they would have enjoyed in the state courts; i.e., in this case, the Indiana courts. *Erie Railroad v. Tompkins,* 304 U.S.

64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), *Guaranty Trust Co. v. York,* 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945), *Bernhardt v. Polygraphic Co. of America, Inc.,* 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1956), *Allstate Insurance Co. v. Charneski,* C.A. 7th, 286 F.2d 238 (1961). This is well settled, and plaintiffs must comply with the laws of the state, except that plaintiffs cannot be barred or precluded from their selection of the federal court as their forum where concurrent jurisdiction exists with the state court. *Waterman v. Canal-Louisiana Bank & Trust Co.,* 215 U.S. 33, 30 S. Ct. 10, 54 L. Ed. 80 (1909), *United States v. Peoples Trust & Savings Co.,* C.A. 7th, 97 F. 2d 771 (1938), *Hellrung v. Lafayette Loan & Trust Co.,* D.C.N.D. Ind., 102 F. Supp. 822 (1951). That is to say that plaintiffs' rights cannot be expanded, nor will their actions be tested by a different body of law merely because they have selected the federal forum.

As already noted in the instant matter, a claimant must file his claim within six months after the first publication of notice to creditors required by Indiana law. Ind. Stat. Ann. Sec. 7-801(a) (Burns, 1953 Repl.). A failure in this regard would forever bar plaintiffs' claims. Ind. Stat. Ann. Sec. 7-801(a) (Burns, 1953 Repl.). A like result would follow in a federal court. *Woods v. Klobuchar,* C.A. 7th, 257 F. 2d 313 (1958).

In the *Woods* case, *supra,* plaintiff brought suit against the personal representative of a decedent for personal injuries inter alia sustained in an automobile collision involving himself and defendant's decedent occurring in Indiana. Notice of defendant's appointment as administratrix was published on June 30, 1954. *Approximately twenty-two months later,* on April 12, 1956, plaintiff filed his action in the United States District Court

for the Northern District of Indiana. The Court's language at Page 314 indicates the crucial question and limitations of the holding in that case as follows:

> "The plaintiff states that the sole contested issue on this appeal is as follows:
>
> > 'Was the Plaintiff-Appellant's action in the Federal Court under Section 1332, United States Code, Title 28, governed by the six (6) month time limit for filing in the court administering the decedent's estate?'
>
> "Our answer must be in the affirmative."

It is clear, therefore, that the facts presented to the Court in that case necessitated a holding only as to the applicability of the six-month statute of limitations to the action there involved. There is, and can be no question, that a claimant in a federal court in an action founded solely upon diversity is bound by the applicable state statute of limitations. *Guaranty Trust Co. v. York, supra.* Although there is language in the *Woods* case, *supra,* which might arguably extend beyond the question there presented, this Court interprets the holding in that case in the light of the facts there involved; specifically, the crucial fact of plaintiff's failure to file his complaint in the federal court before the six-month period of limitation had expired.

Plaintiffs in the instant case have recognized and complied with the six-month limitation requirement of notice. Their complaints were filed in this court within the six months period. However, the Indiana statute also requires that a claim and affidavit be filed with the clerk of the state court having jurisdiction of the estate. Ind. Stat. Ann. Sec. 7-802 (Burns, 1953 Repl.).

At this point, it would appear that plaintiffs are commencing the process of selecting their forum, and in this they have a choice which the law of Indiana cannot unduly restrict or eliminate. *Hellrung v. Lafayette Loan & Trust Co., supra.* Once plaintiffs file their concise statement of claim with the clerk, the claim is transferred automatically to the trial docket at the moment of disallowance by the personal representative. Ind. Stat. Ann. Sec. 7-801 (Burns, 1953 Repl.). In the present case, defendant personal representatives denied the material allegations of plaintiffs' complaint, and a fortiori defendants would likewise have disallowed the claims and they would have been placed on the state court's trial docket and set for trial.

Plaintiffs, however, did not choose to have their cases set for trial in the state court. They selected the Federal District Court sitting in Indiana, and they had a right to do so. Indiana law could not change this in the instant case. *Hellrung v. Lafayette Loan & Trust Co.*, supra.

The real question to be decided here requires this Court to determine to what extent plaintiffs must comply with the Indiana requirements without unduly interfering with or restricting their right of use of the federal forum. Indiana law requires certain steps to be taken for the trial of a claim, which steps the defendant describes in his well written brief as "conditions precedent" to plaintiffs' right to recover. There is no question but that there is Indiana authority to support this view; see, for example, *Otolski v. Nowicki,* 129 Ind. App. 492, 158 N.E. 2d 296 (1959). However, it is equally clear as indicated supra that a state may not through its legislature or courts extinguish or diminish a right created by the Federal Government.

To follow defendants' argument to its logical conclusion could result under certain circumstances in a trial in a

state court and a denial to plaintiffs of their right to select and use the federal forum. This was never the intention of the courts in requiring recognition of state law in diversity cases. *Erie Railroad v. Tompkins, supra, Guaranty Trust Co. v. York, supra.* The basic purpose was to put plaintiffs in no different position by reason of their choice of forum. Defendant would have this court deny to plaintiffs a trial of their cause on the merits by reason of the fact that they were unwilling to proceed to comply with the state requirements to the extent which practically and realistically might have jeopardized or even eliminated their right to trial in the Federal District Court. We do not believe the spirit of *Erie Railroad v. Tompkins, supra,* and subsequent decisions require plaintiffs to go this far. Cf., *Guaranty Trust Co. v. York, supra,* and *Hellrung v. Lafayette Loan & Trust Co., supra.*

Had plaintiffs filed their claims in the state court on the same hour of the same day when they filed their complaints in this court, their claims doubtlessly would have been disallowed, transferred to the trial docket and set for trial. Instead, plaintiffs filed their complaint in this court, and they will be tried and tested by the same body of substantive law which would have been applicable in the state court. Defendants are afforded the same notice and opportunity provided by state law, and their defenses on the merits will be similarly tested.

Defendants further urge this Court in their brief and oral argument that the purpose of the Indiana statutes hereinabove referred to will be lost by failing to require the claim to be filed in the Indiana court. In support of this theory they note that the purpose of the Indiana statutes is to permit the personal representative to conduct a timely investigation to determine whether the claim may

be disposed of without the expense of litagation. *Williams v. Williams,* 217 Ind. 581, 29 N.E. 2d 557 (1940).

This reasoning is persuasive in theory, but not in fact. In the instant case, defendant personal representatives were served with process within the six months required by Indiana law and were thereby afforded ample notice and opportunity to investigate the claim. It is somewhat unrealistic to contend that had defendants wished to allow the claims, they were precluded from doing so by reason of plaintiffs' selection of this forum. We know of no theory or law which supports the proposition that federal courts are less inclined to favor voluntary payments and settlements than are state courts.

Defendants have denied the material allegations of fact in plaintiffs' complaints just as they could have disallowed plaintiffs' claims in the state court. They received the timely notice required by Indiana law and had ample opportunity to investigate the claims and admit (allow) or deny (disallow) as they could have done in the state court. Under these circumstances, both the rights involved and the law governing them are the same in either forum, and we believe that this is the most that defendants may expect under the spirit of the Erie doctrine.

Therefore, it is the opinion of this Court that plaintiffs complied with the Indiana law to the extent that they could do so without materially interfering or jeopardizing their right to select this court as their forum.

Accordingly, plaintiffs' motion to strike defendants' affirmative defenses 2, 3, 4, and 5 is granted and defendants' defenses 2, 3, 4, and 5 are hereby stricken.

The defendant in oral argument has urged this court, pursuant to 28 U.S.C.A. 1292(b) and subject to the dis-

cretion of the Court of Appeals, to authorize an interlocutory appeal. It is the opinion of this Court that the above order, which is not otherwise appealable, involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly, an immediate appeal from this Order may be taken and is hereby authorized subject to the discretion and permission of the United States Court of Appeals for the Seventh Circuit.

It is further Ordered that all proceedings herein be stayed for ten (10) days from the date of entry of this Order. If within such ten days the defendant shall apply to said Court of Appeals for permission to appeal this Order, the proceedings herein shall be further stayed pending determination of such application, or of the appeal if permission is granted.

/s/ Jesse E. Eschbach

United States District Judge

Entered: June 29, 1962

APPENDIX VI

IN THE
APPELLATE COURT OF INDIANA
DIVISION NO. TWO

ROBERT SLATER,	)	
	)	
GEORGE SLATER,	)	
Appellants,	)	
	)	NO. 20370
v.	)	and
	)	NO. 20371
MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, Deceased,	)	
	)	
THE COMMUNITY BANK OF HUNTINGTON, INDIANA, Administrator of the Estate of Donald H. Stoffel, Deceased,	)	
Appellees.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
Honorable Ray Ade, Judge

SMITH, J.

This case arose from a personal injury action filed against the personal representatives of the estates of the two deceased tortfeasors. Plaintiff-appellants, Robert Slater and George Slater, in separate actions each sued Mark E. Stoffel, Administrator of the Estate of Bernard J. Stoffel, deceased, and The Community State Bank of

Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased, to recover damages for injuries sustained in a head on automobile collision between a motor vehicle operated by George Slater and a motor vehicle operated by either Bernard J. Stoffel, deceased, or Donald H. Stoffel, deceased. The collision occurred as alleged in the Complaints, on June 6, 1959, and was the result of the negligent conduct on the part of one of the defendant-appellees.

There are three important factual areas in this case as follows:

1. The appellants as alleged did not comply with Burns' Indiana Statutes, § 7-801(a), 1953 Replacement (Acts 1953, ch. 112, § 1401, p. 295, 1961 ch. 287, § 1, p. 702) which provides in substance that all claims against a decedent's estate, other than those of administration and claims of the United States, shall be forever barred unless filed with the court in which such estate is being administered within six months after the date of the first published notice to creditors.

2. Because the appellants were residents of the State of Georgia, instead of complying with §§ 7-801, 7-802 Burns' Indiana Statutes they attempted to proceed directly against the appellees by complaint and summons filed in the United States District Court for the Northern District of Indiana, Fort Wayne, Division. This civil action was commenced on December 2, 1959. The District Court entered a judgment for the appellants; however, the Court of Appeals, for the 7th Judicial Circuit reversed this judgment by a unanimous decision and entered a judgment for the appellees. *Slater v. Stoffel, Admr.,* et al. 213 F.2d 175 (C.A. 7th, 1963).

The Supreme Court of the United States denied certiorari and remanded the case to the District Court which entered judgment for the appellees on the theory that plaintiff-appellants' claims were barred for failure to file a claim with the court against the decedents' estates within the six month period pursuant to the provisions of Burns' Indiana Statutes 7-801 and 7-802. 375 U.S. 818, 84 S.Ct. 54 (1963).

3. After the Federal District Court rendered judgment for the appellees, the appellants returned to the Huntington Circuit Court where each brought an action for $100,000 damages; and issues were joined in each case on a demurrer to the appellants' complaint. The trial court sustained the appellees' demurrers to the appellants' complaint and the appellants refused or failed to plead over. The appellants' motion for a new trial was overruled, and appellants now assign the trial court's action in overruling the appellants' demurrers as error.

The question presented is one of first impression in Indiana. The question is whether the claimant, suing in tort, may bring an action by complaint and summons against a deceased tortfeasor's estate under Burns' Indiana Statutes § 7-801(f) instead of filing a claim against the estate within six months after first published notice to creditors; and if such a proceeding is allowed under Burns' Indiana Statutes § 7-801(f), then may the provisions of § 7-801(f) be applied retroactively in the instant case to provide relief to the claimant.

Burns' Indiana Statutes § 7-801 provides:

> Limitations on filing claims—Statutes of limitation—Claims barred when no administration commenced—Liens not affected—Tort claims against estate.—(a) All claims against a decedent's estate, other

than expenses of administration and claims of the United States and of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court in which such estate is being administered within six (6) months after the date of the first published notice to creditors.

(b) No claim shall be allowed which was barred by any statute of limitations at the time of decedent's death.

(c) No claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim shall be filed within six (6) months after the date of the first published notice to creditors.

(d) All claims barrable under the provisions of subsection (a) hereof shall, in any event, be barred if administration of the estate is not commenced within one (1) year after the death of the decedent.

(e) Nothing in this section shall affect or prevent any action or proceeding to enforce any mortgage, pledge or other lien upon property of the estate.

(f) *Nothing in this section shall affect or prevent the enforcement of a claim arising out of tort against the estate of a deceased tort-feasor within the period of the statute of limitations provided for such tort action and for the purpose of enforcing such a tort claim the estate of the tort-feasor may be opened or reopened and suit filed against the special representative of the estate within the period of the statute of limitations of such tort:* Provided, however, That any recovery against the tort-feasor's estate shall not affect the distribution of the assets of the estate to the heirs, legatees, or devisees of the decedent tort-feasor unless such suit was filed within the time allowed for

filing claims against the estate. The rules of pleading and procedure in such cases shall be the same as apply in ordinary civil actions. (Acts 1953, ch. 112, § 1401, p. 295; 1961 Ch. 287, § 1, p. 702.) (Emphasis supplied)

Subsection (a) of the above cited statute is commonly known as a non-claim statute. It grants to every person having a claim of any kind or character against a decedent's estate the right to file the same in the court having jurisdiction thereof, and have the same adjudicated, provided such claim is filed within the time specified in the statute.

Donella, Administratrix, etc. v. Crady (1963), 135 Ind. App. 60, 185 N. E. (2d) 623.

Chapter 112 of the Acts of 1953 (Burns' Indiana Statutes, Section 7-801) was amended in 1961 by adding thereto subsection (f). Subsection (f) provides in substance that a tort action may be brought for such tort, provided recovery against the tortfeasor's estate does not affect the distribution of the assets. The distribution may be disturbed if the suit was brought within the time allowed for the filing of claims against an estate as the appellants have done in the present case. Burns' Indiana Statutes, Section 7-801(f).

The appellants' cause of action arose on June 6, 1959 and was preserved or allowed to survive the death of the appellees by Burns' Indiana Statutes, Section 2-403, which provides:

"All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the representative of the deceased party, except actions for personal injuries to the deceased party, which shall

survive only to the extent provided herein. Any action contemplated in this section or in section 6 (§ 2-402) of this act may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased."

Burns' Indiana Statutes, Section 2-602, provides:

"The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards.

First. For injuries to person or character, * * *, within two (2) years."

The appellants' cause of action is limited only by the above two-year statute of limitations.

The record reveals that at the time this action was filed in the Huntington Circuit Court, the statute of limitations provided in Burns' Indiana Statutes, Section 2-602, had not yet expired.

The commencement of an action to enforce a right before the statute of limitations has run against it, arrests or suspends the running of the statute, and a lapse of time after the action is commenced which is not attributable to the appellants' fault or neglect will not bar the enforcement of the right.

Elam v. Neville, 129 F. Supp. 437 (N.D. Ind. 1955);

McAfee v. Reynolds (1891), 130 Ind. 33, 28 N.E. 423.

An action is commenced for limitation purposes at the time the complaint is filed and summons issued.

Elam v. Neville, supra;

Peoples Trust & Savings Bank v. Hennessey et al, (1938), 106 Ind. App. 257, 153 N.E. 507;

I.L.E., *Limitation of Actions,* Vol. 19, § 81, p. 58.

The appellants' cause of action arose on June 6, 1959 and the action was filed in the United States District Court on December 2, 1959. This interim period between the time the cause of action arose and the time of filing of the cause of action consists of one hundred seventy-nine (179) days, and is to be considered the length of time the statute of limitations had already run. On the 20th day of November, 1963, the United States District Court entered a summary judgment against the appellants. On October 24, 1964, the appellants filed a cause of action in the Huntington Circuit Court to enforce said claim for damages. The interim period of time between the entry of the summary judgment by the federal district court until the filing of the cause of action in the Huntington Circuit Court consisted of three hundred and thirty-eight (338) days. It is, therefore, apparent that only five hundred and seventeen (517) days of the two year statute of limitations had elapsed prior to the date that they filed their cause of action in the Huntington Circuit Court.

It is our opinion that the federal court should have given Burns' Indiana Statutes, Section 7-801, subsection (f) retroactive application for the enforcement of the cause of action filed prior to the date of the enactment of subsection (f). Therefore, the two year statute of limitations, referred to in subsection (f), had not run, leaving only the

issue of the application of subsection (f) to be determined by the federal court.

The federal courts have the power to entertain claims against estates and to apply state law cannot be questioned.

> *Hanna v. Plumer* (1965), —— U.S. ——, 14 L.ed. (2d) 8, 85 S. Ct. ——

Our Court has long held that a procedural statute may be given retroactive application where such is necessary to carry out the purpose of the statute, and no new rights are given or existing rights taken away, and only a new remedy is afforded for the enforcement of an existing right.

> *Herrick v. Saylor,* 245 F. (2d) 171 (1957 7th Cir.);
>
> *Standard Accident Insurance Company v. Miller,* 170 F. (2d) 495 (1948 7th Cir.);
>
> *Staple v. Richardson* (1966), —— Ind. App. ——, 212 N.E.(2d) 904.

The Indiana General Assembly, in amending Section 7-801 Burns' Indiana Statutes by adding subsection (f) thereto, intended to remove from the enforcement of tort claims the condition precedent requiring the filing of such claims within six (6) months after notice to creditors.

> "Such legislative action, or reaction, can only be construed as an expression of total dissatisfaction with the results which had necessarily obtained in cases which had previously been decided under the statutes, to-wit: the socially, morally, and legally unjustifiable protection of a wrongdoer at the expense of the injured party."
>
> *Staple v. Richardson, supra.*

The federal courts have concurrent jurisdiction with state courts exercising probate jurisdiction in respect to establishing the validity of claims against estates of decedents provided the federal requirements of amount in controversy and diversity of citizenship are satisfied.

Because Section 7-801 (f) Burns' Indiana Statutes is a procedural statute, the federal court should have given said section of the statute retroactive application in the instant case.

In the absence of express language to the contrary an amendatory act ordinarily is construed as prospective and not as retroactive.

> *Cummins v. Pedee et al* (1910), 174 Ind. 115, 91 N.E. 529.

In the event the new legislation does not impair an existing right or deny a remedy for its enforcement, but merely modifies the proceedings, it applies to all cases pending and subsequent to its enactment.

> *Kingan & Company, Limited v. Ossam* (1920), 75 Ind. App. 548, 121 N.E. 289.

The federal court's error was compounded by the trial court when it sustained the demurrers to appellants' complaint and overruled their motion for a new trial.

We summarily reiterate that appellants' cause of action survived the death of the appellees and was tolled by the commencement of this action in the federal district court and again in the trial court. The 1961 amendment to Section 7-801 by adding subsection (f) thereto is a procedural requirement to be applied to any action pending in the courts at the time of its passage. It should have been so

applied in the case at bar. Failure to do so was prejudicial and reversible error on the part of the federal courts and trial court. It is our opinion that the trial court erred in overruling appellants' motion for a new trial; and the judgment of the trial court is hereby reversed with instructions to sustain appellants' motion for a new trial.

Judgment reversed.

BIERLY, J. CONCURS;
HUNTER, J. CONCURS IN RESULT;
MOTE, J. NOT PARTICIPATING.